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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR PETITIONERS.

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vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

CITATIONS TO OPINIONS BELOW.

The opinions of the Court of Common Pleas (R. 148-156) and of the Court of Appeals, Summit County (R. 158-166), are unreported. The decision of the Supreme Court of Ohio, dismissing petitioners' appeal "filed as of right herein," for the reason that "no debatable constitutional question is involved" (R. 172), is reported in 164 O. S. 285, 130 N. E. 2d 237.

JURISDICTION.

The petition for a writ of certiorari was granted on May 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).[1]

QUESTIONS PRESENTED.

1. The employer involved operates three stores in the State of Ohio, at which it sells meat and meat products to retail and wholesale customers. In the course of this business, the employer annually imports directly from other states merchandise valued at over $100,000, amounting to approximately fifteen per cent of its gross purchases. The employer also causes to be imported from other states merchandise valued at approximately $200,000 annually. The first question presented is whether the employer's business operations "affect commerce" within the meaning of the National Labor Relations Act.

2. For budgetary or other administrative reasons, the National Labor Relations Board refuses to assert its own jurisdiction unless the interstate operations of the employer involved in a labor dispute are substantially greater than that set forth in question numbered 1. The second question is whether the national Board's declination of jurisdiction vests in the states jurisdiction to apply to peaceful picketing arising out of a labor dispute state law

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[1] The federal questions were properly and timely raised by petitioners at all stages of the proceedings (R. 8, 13, 148, 166-167, 173, Tr. 8-69) and were discussed and decided adversely to petitioners by the Court of Common Pleas and by the Court of Appeals. In holding that the federal questions urged by petitioners were not "debatable", the Supreme Court of Ohio rejected petitioners' contentions on the merits (*Tumey* v. *Ohio*, 273 U. S. 510, 515; *Matthews* v. *Huwe*, 269 U. S. 262).

or policy which duplicates, parallels or conflicts with the policies of the national Act.

3. Whether a state may, consistently with Sections 7 and 13 of the National Labor Relations Act and the Fourteenth Amendment, enjoin peaceful picketing in front of the entrance to an establishment involved in a labor dispute, on the ground that the employer owns the property on which the pickets are walking and objects to its use for picketing, where the employer owns all of the property between the store entrance and the highway and maintains the entire area for use by its customers.

STATUTES INVOLVED.

The statutory provision principally involved is Section 10(a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 141 *et seq.*). That section reads as follows:[2]

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and

[2] Prior to the 1947 amendments, Section 10(a) read as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

The other relevant provisions of the Act are reprinted in the Appendix, pp. 93-105, *infra*.

STATEMENT.

A. The Labor Dispute.

Fairlawn Meats, Inc., hereinafter referred to as Fairlawn, operates three stores in the vicinity of Akron, Ohio, at which it sells meat and related products to both wholesale and retail customers (R. 158-159; 46-47, 48-49).[3]

On May 10, 1952, Fairlawn entered into a preliminary agreement in which it agreed to recognize the Union as exclusive bargaining agent for its employees; to meet with the Union to negotiate a contract covering wages, hours, and other working conditions, and to incorporate in such contract a union security clause (R. 150; 7, 9). The contract proposed to Fairlawn by the Union pursuant to this agreement included a union-shop provision (R. 151; 176, 18-19).

Prolonged negotiations thereafter failed to produce agreement on substantive terms (R. 150, 159; 19, 20, 41, 78, 111-114). On February 1, 1954, Ekers, owner of Fair-

[3] The stores are located at 278 West Avenue, Tallmadge, Ohio, 2246 W. Market Street, Akron, Ohio, and the junction of U. S. Route 21 and State Route 176, West Richfield, Ohio (R. 1, 46). As reference to individual stores is made hereafter, they are described as the Tallmadge, Market Street and West Richfield stores.

lawn (R. 46), invited fifteen "key" employees of the Tallmadge store to a meeting at a local tavern after working hours (R. 75, 84-85, 131-132, 133). There he told them that he did not want them to join the Union (R. 19-20, 132, 77-78); that signing a contract with the Union would result in cutting down to a forty (40) hour week, and loss of overtime, and that the store would close on Sunday (R. 132-133).

On February 2, 1954, the Union voted to authorize a strike at Fairlawn if negotiations were not successfully concluded (R. 21, 22, 41). The next day, Ekers told the officers of the Union that he did not care to negotiate further (R. 150, 159; 22-23, 41, 79, 114-115). On February 4, 1954, the Union called a strike and established a picket line in front of the entrance of each of the three stores (R. 159; 115-116). The pickets carried placards reading: "On strike" (R. 155; 21, 33).

At the time the picketing began, eighteen of Fairlawn's employees were either members of the Union or had authorized the Union to represent them (R. 159; 116, 42-43). Pollock, President of the Union, testified that he believed that the stores employed approximately thirty-five employees and that the Union represented a majority (R. 155; 125-126, *cf.* R. 38). Five of the employees of the West Richfield store went on strike and participated in the picketing (R. 116, 28). These five were later joined by two part time employees (R. 159; 116-117; 126-127). Two other employees, who did not picket, remained away from work until February 11, 1954 (R. 159; 117-118).

On or about February 10, 1954 (R. 99), two days after Fairlawn filed its petition to enjoin the picketing, p. 16, *infra*, Thursby, manager of the Tallmadge store (R. 90,

99), prepared a petition (R. 85, 91, 97 98) declaring that the "employees of the Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer * * * and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union" (R. 151, 165; 85, 97, 185). Thursby himself circulated the petition among the employees at Tallmadge and asked them to sign (R. 90-91, 98-99, 133-134, 138).[4] At Market Street, Brigham, the manager, called the employees together and asked them to sign (R. 92, 104-105, 106). At West Richfield, Moyer, the manager, asked the employees to sign (R. 92, 107-108). In all, 41 employees signed the petition (R. 151; 185-186). After February 19, 1954, seven employees of the Tallmadge store joined the strike (R. 126-127, 128-129, 188A). On March 6, 1954, Thursby called employees Vargo, Herbruck and Tandarich into his office and inquired whether, since they had joined the Union, they would like to resign their jobs. Thursby dictated resignation forms, and the employees signed them (R. 36, 74, 100-103, 141, 184, 186, 187). After learning that employee Carpenter had joined the strike, Ekers went to see him and induced him to sign a statement of resignation (R. 72-74, 81-82, 87-88, 89, 185).

B. PROCEEDINGS BELOW.

On February 8, 1954, Fairlawn filed in the Court of Common Pleas, Summit County, Ohio, a petition for permanent injunction and an application for temporary restraining order prohibiting all picketing by defendants

[4] Employee Rodocker testified at the hearing that he signed "in order to protect my job" (R. 134; see also R. 138).

(R. 1-4).[5] In its petition Fairlawn alleged that it employed fifty (50) employees at its three stores (R. 1); that its employees have been "free from influence by the plaintiff as to whether they should deal with the plaintiff individually * * * or collectively" (R. 2); that the employees had freely chosen to represent themselves individually rather than to be represented by the defendant Union (R. 2); that "no bona fide labor dispute" exists between plaintiff and its employees (R. 3); that the Union was engaged in a conspiracy "to compel and coerce the plaintiff to in turn coerce and compel his employees * * * to become members of * * * defendant union" (R. 2); and that pursuant to that conspiracy defendant had "caused a number of individuals to picket the meat markets" (R. 3).[6]

The Union filed an amended answer (R. 6-9), alleging, *inter alia,* that Fairlawn's business operations affected interstate commerce within the meaning of the National Labor Relations Act; that the controversy arose out of a labor dispute within the meaning of that Act; that the strike and picketing were entirely peaceful and that the objective was lawful (R. 7); that the national Board had

[5] Upon preliminary hearing, the trial court granted a temporary restraining order prohibiting picketing at the Tallmadge and Market Street stores, but denied relief against picketing at the West Richfield store on the theory that at the latter store employees had left work to go on strike while at the former stores they had not (R. 4-5).

[6] The defendants removed the case to the United States District Court for the Northern District of Ohio, Eastern Division, and in that court filed a motion to dismiss, alleging *inter alia,* that the state court was without jurisdiction to entertain the petition or to grant any of the relief requested because the subject matter of the action had been preempted by Congress in the National Labor Relations Act (Tr. 504-505). The district court, finding prerequisites of removal jurisdiction wanting, remanded to the state court (Tr. 503).

exclusive jurisdiction to hear and determine the matters complained of, and that the state court was deprived by the national Act of jurisdiction to entertain the action (R. 8). In its reply to the amended answer, plaintiff denied that the national Board's jurisdiction was exclusive and asserted that the state court had full jurisdiction (R. 10). The reply further alleged that defendants had engaged in a "secondary boycott" by inducing plaintiff's chief supplier of meat, pursuant to threats, to refuse to sell meat to plaintiff (*Ibid*).

1. The Interstate Commerce Facts.

The uncontroverted evidence shows that Fairlawn annually purchases for resale to its retail and wholesale customers merchandise valued at between $750,000 and $1,000,000 (R. 49-50). Its purchases of meat and other supplies from June, 1952 to June, 1953, exceeded $873,000 (R. 61-62, 65). Of this amount, merchandise valued at over $103,000, was shipped directly to Fairlawn from outside the State of Ohio (R. 50, 66).[7]

Ekers admitted that approximately fifteen per cent of Fairlawn's total purchases are shipped to it directly from outside of Ohio (R. 50).

Fairlawn's principal suppliers of dressed beef are the Gibbs and Peerless Packing companies in Cleveland, Ohio (R. 49, 54-55). During 1953, Peerless sold to Fairlawn dressed beef valued at over $221,000 (R. 143). More than half of the cattle from which Peerless processes dressed beef is shipped to Peerless from other states (R. 144).

[7] In a single month prior to the strike, Fairlawn purchased merchandise valued in excess of $73,000, of which almost $12,000 represented direct out-of-state shipments (R. 67).

During 1953, Fairlawn purchased over $146,000 of merchandise from Gibbs (R. 95, 147, 188). Gibbs, likewise, imports from other states the major portion of the cattle which it slaughters and dresses for sale to customers like Fairlawn (R. 94, 147, 187).

2. The Union Majority Issue.

In addition to the evidence tending to show employer interference, the Union, without waiving its jurisdictional objection (R. 164; 125), adduced evidence tending to show that by the time of the trial approximately twenty-six of Fairlawn's employees had either joined the Union or authorized it to represent them (R. 128-129, 147, 188A, 130, 141-142).

3. The Trespass Issue.

Fairlawn owns approximately 200 feet of property on the east side of State Route 21 in Richfield Township on which the West Richfield store is located (R. 31, 46, 55, 58). The store is set back approximately 50 feet from the curb line of the highway (R. 31). The area between the store and the highway is vacant; a semicircular driveway, with both exits on Route 21, is utilized by automobiles to gain access to the store and to a group of other business houses adjacent to and south of the store (R. 31, 32, 33, 147, D. Exhs. 18-24). The vacant area is used for parking (R. 30, 31-32, 58). There is no sidewalk either paralleling the highway or in front of the entrance to the store (R. 84). Fairlawn's property rights extend "out to the road" (R. 30).

Fairlawn leases approximately 285 feet of property along West Avenue, on which the Tallmadge store is lo-

cated (R. 48, 56, 58). That store, like the West Richfield store, is "in the country" (R. 24, 55). The location of the store with reference to the highway, the customer driveways leading to and from the store to the highway, the parking area in front of the store and the absence of sidewalks are similar to the situation at West Richfield (R. 25, 59, 83-84, 118-119, D. Exh. 19). The lessee's property rights at Tallmadge extend to the center of the road (R. 59). Those few pedestrians who have occasion to traverse the property walk "just off of the pavement" of the street on Fairlawn's leased property (R. 59).

Fairlawn's Market Street store is located in one portion of a building which houses the Sparkle Supermarket (R. 47, 58). Fairlawn owns no interest in the building itself or in the adjacent property (R. 47, 58). At this store also, only a parking area separates the store building from the street (R. 58). There is very little pedestrian traffic (R. 58).

At all three locations, the pickets walked in front of the store, paralleling the street or highway, at a distance variously estimated at from three to twenty feet from the curb line (R. 25-26, 29-30, 45, 55-56, 59, 118-119, 121).[8] Pollock testified that it was his "belief and • • • understanding" that the pickets were walking "on a strip of ground that the public had access to" (R. 127-128, cf. 45). Fairlawn objected to the use by the pickets, employees and non-employees alike, of its property at Richfield and Tallmadge for the purpose of picketing (R. 159; 56-57; Tr. 240-241).

[8] The pickets frequently walked in the paved area—the driveways (R. 25, 33, 44-45). The evidence shows, however, that at no time did the pickets obstruct ingress or egress to the stores (R. 26), and there is no contrary finding (Cf. R. 155).

4. The Secondary Boycott Issue.

Ekers testified that after the picketing began he was followed by Union representatives to the Gibbs and Peerless plants when he went to purchase meat there, and that representatives of these companies refused to sell meat to him (R. 53-55, 80, 82, 90). Evidence was also adduced that representatives of another local union affiliated with the Amalgamated Meat Cutters and Butcher Workmen of North America, the bargaining agent for Gibbs and Peerless employees (R. 70), induced the Gibbs and Peerless managements to stop selling meat to Fairlawn because of its involvement in the labor dispute with petitioner (R. 68-69, 70-71).[9]

C. OPINIONS OF THE COURTS BELOW.

The Court of Common Pleas held that because, as the evidence showed and petitioners conceded, the volume of Fairlawn's interstate imports was insufficient to satisfy the jurisdictional policy standards promulgated by the National Labor Relations Board on July 15, 1954, as the criteria for assertion of its own jurisdiction over retail stores,[10] "if the Board originally had jurisdiction, it had

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[9] The Court of Appeals recited in its opinion that "on one * * * instance, while [Ekers was] at the place where he bought meat for resale, the air was let out of [his] tires" (R. 159; 53). There is not a scintilla of evidence in this record, however, which connects the defendant union or any of its agents with this incident, and the court seems to have placed no reliance upon it (R. 69).

[10] As correctly stated in the opinion (R. 149-150), the Board's current standards for assertion of jurisdiction over retail stores requires annual direct out of state imports of $1,000,000, or indirect imports of $2,000,000. Press release No. 445, "NLRB Announces Changes in Standards for its Exercise of Jurisdiction"; July 1, 1954; Press release No. 449, *ibid*, July 15, 1954; *Hogue*

ceded that to the state court" (R. 150). On the merits, the court found the picketing was entirely peaceful (R. 155), but that the picketing was illegal because its purpose was to compel Fairlawn to enter a union-shop agreement at a time when the Union did not represent a majority of Fairlawn's employees (R. 151, 155). The court stated that since the object of the picketing was organizational, rather than to remedy employee grievances, it did not arise out of a "labor dispute", and that "the banners, which recited: 'On strike,' did not state the truth." (R. 155). The court found that although "the pickets and defendants believed they were acting lawfully", once it developed that Fairlawn had more employees than the Union had estimated, and the Union therefore did not have a majority, they were guilty of "a conspiracy to do an unlawful act" (R. 155). The court also stated that there was "evidence of probative value to sustain a charge of secondary boycott" (R. 156). This evidence, said the court, tended to support the allegation of unlawful objective (ibid). The court entered a permanent injunction prohibiting the defendants from: (1) picketing the stores and places of business of the plaintiff; (2) trespassing on plaintiff's property, and (3) attempting to persuade

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& Knott Supermarkets, 110 NLRB 543. Since Fairlawn's annual gross purchases did not exceed $900,000, it is clear, and petitioners throughout conceded, that the Board would not, under these standards, have asserted jurisdiction over a charge alleging that by its picketing at Fairlawn's premises the Union was engaging in an unfair labor practice. As for the alleged "secondary boycott" involving the Union's activities with respect to the Gibbs and Peerless packing companies, however, it is by no means clear that the Board would not have entertained a charge by Fairlawn. *Cf. Local Union 25* v. *New York, New Haven & H. R. Co.*, 350 U. S. 155; *NLRB* v. *Associated Musicians,* 226 F. 2d 900, 907 (C. A. 2), cert. denied, 351 U. S. 962.

any of plaintiff's suppliers to refuse to sell and deliver merchandise to the plaintiff (R. 156-157).

On appeal, the Court of Appeals considered *de novo* questions of both law and fact (R. 158, 160). It acknowledged petitioners' challenge to the jurisdiction of state courts to enjoin the exercise of "its right to picket the places of business of Fairlawn Meats" (R. 160). The court held, however, that Fairlawn's business did not affect interstate commerce within the meaning of the national Act because its business "is purely of a local character"; the volume of its business "is not large"; it "does not sell any of its products outside of the state of Ohio"; and its "purchases from out of this state, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat-consuming public in Akron and Summit County" (R. 161). The court concluded that "there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case" (Ibid). In view of this conclusion, the court stated that it found it unnecessary to discuss the Board's "jurisdictional yardsticks * * * to determine whether the National Labor Relations Board will assume jurisdiction" (R. 160).

On the merits, the court held that the object of the picketing was "forcing the great majority of employees to join the Union" (R. 163). Pursuit of this object by picketing, the court held, is prohibited alike by the national Act and the law of Ohio (R. 163-165). The court found that the picketing "was part of a plan to avoid an election" by the Board (R. 164). The court said (R. 165):

> Where, then, as in this case, no election has been held under the federal regulations, and it is shown that

> many more than a bare majority have indicated a desire not to organize and join the Union, it would be an 'unfair labor practice' to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes.

The court concluded that (R. 165):

> * * * since the picketing herein was for organizational purposes only, and not to secure a settlement of grievances among the employees, and since the picketing in part was done on land owned by or under lease to Fairlawn Meats, and since the Union by threats and coercion instituted a secondary boycott against Fairlawn Meats, the picketing, although not accompanied by violence, was nevertheless unlawful under the announced policy in Ohio.

The court entered a permanent injunction against defendants in the same terms as the injunction which had been entered by the trial court (R. 167-168).

While refusing to set aside the injunction, the Supreme Court of Ohio did not disclose the reasons which led it to conclude that the constitutional questions raised by petitioners were not "debatable" (R. 172). We must assume, therefore, that it may have adopted the reasoning of either or both courts below.

SUMMARY OF ARGUMENT.

The conduct of the union and of the employer upon which the courts below passed is unquestionably of the kind which is regulated by the national Act. Congress determined that where such conduct occurs in "local" industries, whose operations affect interstate commerce, the states may regulate it if a cession agreement is entered into between the national Board and a state agency pursuant to Section 10(a). The national Board is barred from entering into such cession agreements, however, unless the state has adopted a statute which is consistent, both in terms and as interpreted, with the national Act. The purpose of so restricting the Board's power to cede is to insure "that the national policy will not be thwarted even in the predominantly local enterprises to which the proviso applies." *Amalgamated Association* v. *Wisconsin Board,* 340 U. S. 383, 397.

Congress adopted the proviso to Section 10(a) empowering the Board to cede jurisdiction to the states "to meet situations made possible by *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, where no state would be free to take jurisdiction of cases over which the national Board had declined jurisdiction." *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301, 313. Congress thus invited the states to regulate labor relations in areas over which the Board for budgetary or administrative reasons declined to exercise its powers, but it conditioned its invitation on passage by the states of laws consistent with the national Act. States, like Ohio, which fail to meet the conditions which Congress imposed, and which therefore may not acquire jurisdiction by ces-

sion from the Board, may not apply their own laws or policies to conduct which the Act covers, regardless whether, in any particular instance, the applicable state rules or procedures are consistent or in conflict with those of the national Act. "* * * when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U. S. C. Supp. § 160(a)." *California* v. *Zook*, 336 U. S. 725, 732.

A. Fairlawn's direct and indirect imports from other states, which the courts below ignored, are far in excess of *de minimis*. As this Court has often recognized, Congress determined that labor disputes involving employers such as Fairlawn should be subject to and regulated by the rules and policies of the national Act. *Amalgamated Association* v. *Wisconsin Board*, 340 U. S. 383, 391.

B. The national Board's declination, for budgetary or other administrative reasons, to exercise its jurisdiction over employers like Fairlawn to whom the national Act applies, does not remove such employers from the coverage of the Act. The standards which the Board invokes to effectuate its self-imposed restrictions are entirely different from the standards which Congress adopted, and to which the Board adheres, in determining coverage. Power which the Board declines for budgetary or other administrative reasons to exercise does not thereby cease to exist. Cf. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647, 648. After enactment of Taft-Hartley the Board has uniformly acknowledged that it can vest regulatory power in the states only by a cession agreement executed in accordance with the proviso to Section 10(a), and not by its mere declination to assert jurisdiction.

The argument for treating administrative declination as the equivalent of removal of the national Act from the enterprises involved rests on the fact that parties to labor disputes in such enterprises are deprived by the declination of access to the remedial forum which Congress provided. "Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act * * *. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions, and all courts, state as well as federal, are bound by them." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74.

C. Preemption aside, Congress obviously did not intend to permit the states to invoke rules and policies which conflict with Congress' policies in labor disputes to which the Act applies, even where the Board is unable or unwilling fully to effectuate Congress' policies by undertaking enforcement proceedings of its own. In the Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, pp. 36-37, the Board suggested that states should be empowered to regulate matters covered by the Act in areas where the Board for budgetary reasons declines to assert jurisdiction only if the state's policy in handling such matters is the "same" as the federal policy. The need for precluding conflicting state policy in these areas, which Congress recognized and met in the proviso to Section 10(a), forecloses treating the Board's declination to assert jurisdiction as an invitation to the states to apply conflicting policies of their own.

D. Although the Ohio courts held the picketing illegal on a theory parallel to one of the rules of the federal Act,

analysis shows that, as applied to this dispute, Ohio's labor relations policies are in sharp conflict with federal policy. The Ohio courts ignored Fairlawn's unfair labor practices, which, under the policies of the federal Act, would have been enjoined. They disregarded the fact that the evidence upon which Fairlawn relied to establish the Union's lack of majority was the product of the employer's unfair labor practices, and was therefore neither probative nor admissible under the federal rules. The order entered by the state courts prohibits all picketing and is far broader than the order the national Board would have entered, even if the Board had made identical findings as to the purpose of the picketing and the union's lack of majority. The difference in the prohibitory scope of the decree stems from the fact that Ohio outlaws peaceful strikes and picketing for organizational and recognition purposes which federal law sanctions. The opinions below show that Ohio invokes in labor disputes concepts, like "conspiracy," which Congress repudiated and treats as unlawful conduct which Congress determined to leave free. In addition, by authorizing employers to resort directly to its courts for injunctive relief against peaceful conduct amounting to unfair labor practices, Ohio adheres to the "court approach" which Congress deliberately eschewed as being inconsistent with its objective of improving relations between management and labor in all industries to which federal power under the Commerce Clause extends.

E. The legislative history shows, and the opinions of this Court confirm, that Congress adopted the cession plan as the alternative to leaving "uncontrolled large areas of industrial conflict," *i. e.*, the areas over which the Board declined, for budgetary or other administrative reasons,

to assert jurisdiction. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 784. The language, context and purpose of the proviso unite in establishing that Congress intended to preclude the states from exercising jurisdiction under their own laws over cases arising in enterprises over which the Board declines to assert jurisdiction, unless the states undertake to treat such cases just as they would be treated if the Board asserted jurisdiction. Congress' reasons for imposing limitations on the Board's power to cede regulatory power to the states would be thwarted if the states were held free to regulate in the absence of a cession agreement. That parties over whom the national Board declines to assert jurisdiction are left without remedy. That result is attributable only to the states, which, by failing to pass statutes consistent with the federal Act, have precluded the national Board from exercising its power to cede jurisdiction over such enterprises to the states. If, as Congress hoped and anticipated, the states had passed consistent laws there would be no room for the argument that the Board's declination to assert jurisdiction leaves anyone without remedy.

Even though the states have failed to bring their laws into conformity with federal policy, Congress has thus far deemed it more important to continue to exclude inconsistent state policies and procedures than to assure that a remedy of some kind is available to all parties under all circumstances. Report of the Joint Committee on Labor Management Relations, 80th Cong., 2nd Sess., pp. 30-31. Judgments of this kind are for Congress to make, and the wisdom of its decision is not an appropriate subject of judicial inquiry.

F. By treating the pickets, employees and non-employees alike, as trespassers because in picketing near the store entrances they walked over territory in which Fairlawn has a proprietary interest, the courts below trenched upon the exercise of rights which Section 7 of the Act and the Fourteenth Amendment protect against state infringement. By virtue of the location of the stores, pickets, like casual pedestrians, must walk on "private property" or they cannot picket the stores at all. If Ohio can prohibit peaceful picketing at the store entrances on the "trespass" theory in this case, then merely by denying permission to picket in areas which they have thrown open to employees, customers and casual pedestrians, store owners can foreclose all picketing in suburban shopping centers, a large and growing segment of the nation's retail industry. Because of the national Act's objective of protecting neutral employers against involvement in labor disputes, the Board holds that pickets must confine themselves to the area adjacent to the entrance of the establishment involved in the dispute. To reconcile this limitation with effectuation of the right to picket at the situs of the primary dispute the Board holds that the legality of peaceful picketing cannot "depend on title to property." *Retail Clerks Union,* 116 NLRB No. 99, 38 LRRM 1323, 1324. This is clearly a case in which "some dislocation of property rights [is] necessary in order to safeguard the right to collective bargaining." *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 232; *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 685; *Schneider* v. *State,* 308 U. S. 147, 162-165.

ARGUMENT.

Introduction.

The central issue in this case, as in No. 50, this term, is whether, in the absence of a cession agreement between the national Board and a state agency executed pursuant to Section 10(a) of the national Act, a state may apply to an enterprise which is subject to the national Act, but over which, for administrative reasons, the Board would decline to assert jurisdiction, a state policy which parallels, duplicates or conflicts with the labor relations policies which Congress adopted. Stated otherwise, the question is whether the Board's administrative declination to assert its jurisdiction amounts to a cession of regulatory power to the states.

Those who contend that the national Board's declination should leave the states free to apply their own laws urge that otherwise parties affected by the Board's declination may be denied all remedy against infringement of rights which the national Act confers upon them. The implication is that Congress could not have intended such a result. What this argument overlooks is that Congress invited the states to participate in enforcement of national labor policy in those areas in which the Board chose not to exercise its authority. But it conditioned its invitation upon the passage by the states of laws consistent with the national Act. Thus far the states have failed to pass such laws. Present inability of the states to accord a remedy for conduct violative of the national Act is, therefore, not a neces-

sary consequence of Congress' action; Congress is not fairly chargeable with having intended to leave parties subject to the Act remedyless; that result flows rather from inaction by the states themselves. It would seem to go without saying that the failure of the states to accept the conditions imposed by Congress upon their exercise of regulatory power does not warrant opening for judicial redetermination Congress' decision as to the circumstances under which the states should be permitted to play a role.

In succeeding portions of this brief we shall show that each of the theories which have been advanced to authorize state regulation in the absence of a cession agreement between the national Board and a state agency would nullify the proviso to Section 10(a); that the result of such nullification would be either to permit the states to apply laws inconsistent with the national Act or, if the application of consistent laws only were permitted, to transfer from the Board where Congress placed it, to the courts, the function of determining consistency in the first instance. We conclude that, if the clear intention of Congress is to be effectuated, state action which would fall if the Board did not decline to assert jurisdiction,[11] cannot, in the absence of a cession agreement, be permitted to stand.

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[11] Ohio decisions make it clear that but for its holding that the employer in this case was not subject to the national Act, either as a constitutional matter or because of the Board's declination to assert jurisdiction, the court below would have set aside the injunction on constitutional grounds. *Grimes & Hauer, Inc.* v. *Pollock*, 163 O. S. 372, 127 N. E. 2d 203, cert. denied, 350 U. S. 900.

I.

THE NATIONAL LABOR RELATIONS ACT APPLIES TO THE LABOR DISPUTE WHICH GAVE RISE TO THE INSTANT CASE.

A. Fairlawn's Operations Affect Interstate Commerce Within the Meaning of the National Act.

The legislative history of both the Wagner and Taft-Hartley Acts emphasizes, as this Court has frequently held, that Congress deliberately enacted these laws to govern labor relations in all industries which Congress' power under the Commerce Clause could reach. S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess., pp. 7, 19; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606, 607; *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647; *Amalgamated Association, etc.* v. *Wisconsin Board*, 340 U. S. 383, 391.

In deciding "what matters are to be taken over by the central Government and what to be left to the States" (*Polish National Alliance*, case *ibid.*), Congress drew the line at labor disputes which could not "affect" interstate commerce. Only those disputes did Congress regard as of "purely local significance." S. Rep. No. 573, *supra*, p. 7. Congress rejected the proposal to withhold federal regulation from labor disputes involving "very small employer units." *Ibid*, see also, 93 Cong. Rec. 3834. And it did not intend to make application of the national Act depend on whether the volume of commerce which might be affected by a labor dispute was "great or small." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. at 607.

It has long been settled that the national Act applies to

business enterprises "which in isolation might be deemed to be merely local" (*Polish National Alliance, etc.* v. *National Labor Relations Board*, 322 U. S. 643, 648), if such enterprises regularly cause to be imported from or exported to other states a quantity of merchandise or supplies greater than that to which courts apply the "maxim *de minimis non curat lex.*" *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 683-685; *National Labor Relations Board* v. *Fainblatt, supra; Amalgamated Association, etc.* v. *Wisconsin Board, supra.* Under this test "local" businesses which import merchandise from other states of far less value than the more than $100,000 worth of goods which Fairlawn annually imports directly, and the approximately $200,000 worth of good which it imports indirectly, are subject to the Act.[12]

The Court of Appeals below therefore clearly erred in holding that because Fairlawn's business is of "a local character," and because its out of state purchases "do not constitute a large portion" of its total purchases, Fair-

[12] See, e. g., *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684 (annual purchases by local electric work contractor of over $55,000 from out of state held "not negligible"); *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 306-307, cert. den., 347 U. S. 919 (C. A. 9) (annual out of state purchases of approximately $12,000 held to bring local laundry and dry cleaning establishment within reach of the Act); *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9), cert. den., 348 U. S. 917 (imports of approximately $77,000 annually held sufficient to subject local plastering contractor to Board's jurisdiction); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 196 F. 2d 424, 426 (C. A. 5), aff'd *sub silentio*, 344 U. S. 344 (imports valued at more than $82,000 held adequate to subject local soft drink bottler to federal jurisdiction); *National Labor Relations Board* v. *El Dorado Water Co.*, 195 F. 2d 950, 952, 953-955 (import of supplies valued at $65,000 for use in maintaining facilities held to subject local water company to national Act).

lawn's labor relations are not subject to the national Act.[13] Cf. *Report of the Joint Committee on Labor Management Relations,* No. 986, Pt. 1, 80th Cong., 2nd Sess., p. 31, quoted p. 81, *infra.*

B. The Fluctuating Administrative Practices and Policies of the National Labor Relations Board in Exercising Its Jurisdiction Do Not Determine the Coverage of the National Act.

The suggestion of the Court of Appeals below (R. 160-161), that the Board's "jurisdictional yardstick * * * may be helpful" in determining whether a particular enterprise is subject to the national Act, misconceives the nature and purpose of the yardsticks. From virtually the inception of the Wagner Act the Board declined to handle all of the cases to which the Act applied, and over which the Act vested the Board with jurisdiction. As the Board stated in its brief to this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* No. 55, Oct. term, 1946, pp.

[13] Fairlawn's direct imports from other states amount to approximately 15% and its indirect imports to approximately 20% more of its total purchases (see pp. 8-9, *supra*). Yet even if far less than 30% of Fairlawn's supplies came from other states the Act would be applicable, for the statute "cannot be applied by a mere reference to percentages". *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467. See also, *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. 2d 198, 201 (C. A. 9) (interstate business only 10% of gross business); *J. L. Brandeis & Sons* v. *National Labor Relations Board,* 142 F. 2d 977, 979-980 (C. A. 8), cert. den., 323 U. S. 751 (interstate sales only .0024% of total); *Barton Brass Works,* 78 NLRB 431, 432, out of state sales of $28,000, amounting to 7% of total, held not *de minimis,* quoting *National Labor Relations Board* v. *Suburban Lumber Company,* 121 F. 2d 829, 832 (C. A. 3); "*De minimis* in the law has always been taken to mean trifles —matters of a few dollars or less".

67-68: "The necessity for this abnegation is in large part budgetary. With the appropriations available to it there has always been a limit to the case load which the Board can handle." The Board decided that it would better effectuate the policies of the national Act if it were to devote its limited funds, personnel and other resources to handling labor disputes in industries which have a relatively large impact on interstate commerce, than to handle all the cases as they are filed, thereby running the risk that it might be unable to handle some cases involving major interstate industries. That conclusion led the Board to announce that it would not "effectuate the policies of the Act" to assert its jurisdiction over certain relatively local enterprises. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 684.

The area over which from time to time the Board declined to assert its jurisdiction has both expanded and contracted. This the Board explained in its brief in *Haleston Drug Stores, Inc.* v. *National Labor Relations Board* (No. 12412, C. A. 9, 1951), 187 F. 2d 418, 421: "Because both case-load and budget vary from time to time * * * cases which, at one period, warrant an assertion of jurisdiction may not warrant it at another period, and *vice versa.*"[14]

Prior to 1947, the Board manifested its declination to assert jurisdiction both by adopting general policies applicable to certain industries or classes of cases and, in other areas, on a case by case basis. See Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* p. 70. Before 1947, the Board generally declined to assert its jurisdiction in cases arising

[14] Quoted in Feldblum, *Jurisdictional "Tidelands" in Labor Relations,* 3 Labor Law Journal 114, 115.

in the building construction industry. After 1947, in deference to the legislative history which showed that Congress was particularly concerned with eradicating some of the newly defined union unfair labor practices which were prevalent in that industry, the Board changed that policy.[15]

In 1950, primarily for the purpose of clarifying the areas in which it would and would not assert jurisdiction, the Board attempted to codify the self-denying policies which it had developed during the preceding years.[16] These standards were framed largely, although not exclusively, in terms of the dollar volume of goods directly and indirectly shipped to or received from out of state sources by the business enterprise involved in the dispute.[17] The amounts varied depending on whether shipments were made to or were received from out of state sources, and on whether the effect on interstate commerce of the employer's operations was "direct" or "indirect." In some respects the 1950 codification expanded the area over which the Board would assert jurisdiction. For example, prior to 1951, the Board declined to assert jurisdiction over taxicab companies which served terminals of interstate carriers on the ground that their operations were "essentially local

[15] NLRB, Sixteenth Annual Report (Gov't. Print. Off., 1952) pp. 34-36. The report also notes at p. 34 that "Between 1947 and the adoption of the new standards in 1950, the Board asserted jurisdiction in a number of cases in the building industry, where jurisdiction probably would not be taken under the [1950] standards."

[16] See mimeograph release of National Labor Relations Board, October 6, 1950, entitled "NLRB Clarifies and Defines Areas in Which it Will and Will Not Exercise Jurisdiction," cited in *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council, supra.*

[17] NLRB, Sixteenth Annual Report (Gov't. Print. Off., 1952) pp. 15-16.

in character." *Skyview Transportation Co.*, 90 NLRB 1895, 1897. In January, 1951, the Board began to assert jurisdiction over such companies on the ground that they were "instrumentalities of commerce." *Skyview Transportation Co.*, 92 NLRB 1664, 1665. In other respects, the area over which jurisdiction would be asserted was narrowed. See note 15, *supra*.

In 1954, the Board announced a general revision of its policies with respect to assertion of jurisdiction. Change was accomplished largely by raising the dollar volume of interstate commerce for the various classes of enterprises involved.[18] Certain enterprises over which the Board had asserted jurisdiction under the 1950 standards whenever the statutory *de minimis* standard was met, such as utilities, local street railway and bus systems, companies operating as an integral part of a multistate enterprise, operations which affected national defense, and others, were subjected to new dollar-volume tests.[19] In other industries, such as taxicab companies, where the Board had previously asserted jurisdiction if a dollar volume test was met, the Board thereafter declined to assert jurisdiction regardless of the volume of interstate commerce affected.[20] The 1954 standards have not been static, nor have they proved easy to apply.[21]

The Board stated that its 1954 revision was grounded

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[18] NLRB, Nineteenth Annual Report (Gov't. Print. Off., 1955), pp. 2-5.

[19] Compare NLRB, Nineteenth Annual Report, *supra*, pp. 3-5, with Sixteenth Annual Report, *supra*, pp. 23-39.

[20] Compare *Skyview Transportation Co.*, 92 NLRB 1664, with *Checker Cab Co.*, 100 NLRB 683.

[21] Roumell & Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. of Detroit L. J. 135, 148 (January, 1955).

in the same considerations which had led the Board, from the beginning, to decline to handle cases involving relatively "local" enterprises. These were (*Breeding Transfer Company*, 110 NLRB 493, 497):

> (1) the problem of bringing the caseload of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) overall budgetary policies and limitations.

The nature and purpose of the standards establish that they were not designed and cannot serve to define or limit the coverage of the national Act. The Board has always acknowledged that "* * * the statutory test for legal jurisdiction under the Act which we administer is different" from the "self-denying rule" (*National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), which the Board creates for purely administrative reasons. *East Newark Realty Corp.*, 115 NLRB No. 75. As the Board stated in the *East Newark* case, *supra*, with respect to an employer over whom it declined to assert jurisdiction pursuant to its 1954 policy, "there can be no question but that this Employer's operations affect commerce within the meaning of the Act."

That the Board in the area affected by its standards declines to exercise jurisdiction only as a matter of administrative policy itself shows that the enterprises involved are covered by and subject to the national Act. If they were not subject to the Act there would be no occasion for the Board to exercise administrative discretion; it would

be compelled to refrain from exercising jurisdiction as a matter of law. Accordingly, the federal courts of appeals have uniformly held that the Board's "self-imposed rule is not jurisdictional." *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9), cert. den. 348 U. S. 917; *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), cert. den. 341 U. S. 950; *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538, 539 (C. A. 6), cert. den. 347 U. S. 1015; see also, *Wisconsin Board* v. *Teamsters' Union*, 267 Wisc. 356, 365, 66 N. W. 2d 318, 323; cf. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54 (C. A. 4), cert. den. 321 U. S. 795.

The Board's new policy standards, like the old, do not even purport to determine that it is not appropriate that the enterprises affected be governed by federal law or that state law rather than federal should apply to them. The majority of the Board said in the *Breeding* case, *supra*, that "a desire to establish broader State jurisdiction is in no wise a factor in our decision." 110 NLRB at 497.

To accord to the standards the effect of limiting the coverage of the national Act would be to permit the Board to reverse Congress' judgment as to "what matters are to be taken over by the central Government and what left to the States." Under the policy standards, the Board's assertion of jurisdiction turns on whether the volume of commerce affected is "great or small," and the standards exclude hundreds of thousands of employees of "small employer units." Congress, however, refused to set quantitative commerce limits to the Act's coverage, and it intended the Act's protection to extend as well to employees of small employers as to employees of larger concerns, pp. 23-24, *supra*.

When Congress amended the Act in 1947 it was well

aware that for budgetary reasons the Board "could not effectuate the policies of the Act committed to it over the whole range of its authority" (*Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 778, separate opinion of Mr. Justice Frankfurter), and that the Board therefore declined, as a policy matter, to assert jurisdiction over certain labor disputes to which the Act applied on the ground that they were predominantly "local" in character. Yet Congress did not narrow the coverage of the Act to conform to the administrative limitations which the Board had imposed, or might in the future impose, on the exercise of its jurisdiction. Cf. p. 82, note 25, *infra*. On the contrary, it reenacted the jurisdictional language of the 1935 Act without change. See *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 684.

Adoption of the proviso to Section 10(a) of the amended Act reveals Congress' understanding that the national Act applies to labor disputes "affecting interstate commerce" which occur in industries "predominantly local in character"; the very industries over which, historically, the Board had declined for budgetary reasons to assert jurisdiction. Cf. Report of the Joint Committee on Labor Management Relations to the Second Session of the 80th Congress, quoted, p. 81, *infra*. The proviso contains a method by which the states may acquire jurisdiction to regulate labor disputes in these predominantly local industries. Such an enabling provision would obviously have been unnecessary if Congress had understood or intended that the Board's refusal to assert jurisdiction over "local" industries operated to remove such industries from the coverage of the Act. Removal of the Act would itself lift the bar of federal preemption to state jurisdiction. No statutory provision would have been necessary to revest the states with authority over an area to which federal law did not extend. Cf. note 22, pp. 38-39, *infra*.

The terms of the proviso would be meaningless and inoperative if the Board's mere declination to assert jurisdiction operated to restrict the Act's coverage. The proviso enables the Board to cede to the states its jurisdiction over "cases not predominantly national in character" (S. Min. Rep. No. 105 on S. 1126, p. 38, quoted at p. 64, *infra*). If the Board's refusal for administrative reasons to process such cases of itself terminated the Act's applicability, the Board would have no jurisdiction left to cede. Cession of jurisdiction to the states by agreement could then occur only in those areas in which the Board normally does not decline to assert its jurisdiction, *i. e.*, industries which are not "predominantly local in character". But in the proviso Congress expressly prohibited the Board under any circumstances from ceding jurisdiction over such labor disputes to the states.

The Board has recognized that although Congress permitted it to decline to assert its jurisdiction where budgetary or administrative considerations so required, Congress precluded the Board from divesting itself of jurisdiction except in accordance with the terms of the proviso. The Board's authority to decline to assert jurisdiction stems from the fact that Congress "empowered" rather than "directed" the Board to assert jurisdiction in any case within reach of the Act. *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9). But to refrain from exercising power is not to terminate its existence. *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538, 540 (C. A. 6), cert. den. 347 U. S. 1015. As this Court said in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647-648:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be

prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by non-user."

Despite its "strong * * * desire for comity", the Board has held time and again that "it lacks power under the present statute to divest itself of jurisdiction, except in conformity with Section 10(a) of the amended Act." *Punch Press Repair Corp.*, 89 NLRB 614, 615; *Adams Motors, Inc.*, 80 NLRB 1518, 1519; *Kaiser-Frazer Parts Corp.*, 80 NLRB 1050, 1052. Absent a cession agreement, jurisdiction which the Board declines for administrative reasons to exercise does not pass to the states; it remains where Congress placed it—in the Board.

Moreover, since enactment of the Taft-Hartley Act in 1947, the Board has explicitly and consistently taken the position that the exclusiveness of its jurisdiction *vis-a-vis* the states is not altered or impaired by its refusal to entertain cases for budgetary or other administrative reasons. For example, in its Memorandum as *Amicus Curiae* in *Gilson Bros.* v. *Wisconsin Employment Relations Board*, No. 383, October Term, 1949, pp. 8-9, the Board said: "In authorizing the Board under certain circumstances to cede its jurisdiction to state agencies Congress made manifest its intention that, absent cession, the states were not to exercise jurisdiction as to matters covered by the National Act involving employers and employees who are subject to the National Act." In adopting the proviso "Congress acted on the premise that, absent specific authorization the states were entirely precluded from deciding cases or questions which the National Board was empowered to consider even though for budgetary reasons the National Board de-

clined to exercise its jurisdiction in a particular case." Brief for the National Labor Relations Board as *Amicus Curiae* in support of petition for rehearing in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, Nos. 14 and 15, October Term, 1948, pp. 17-18, see also pp. 44-45; Brief for the National Labor Relations Board as *Amicus Curiae* in *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, No. 43, October Term, 1952, pp. 35-36. In its brief as *Amicus Curiae* in *Garner* v. *Teamsters Union*, No. 56, October Term, 1953, pp. 11-12, the Board said: "The proviso clearly indicates that with respect to conduct which the Board is authorized to remedy, no concurrent jurisdiction exists in the states except in strict conformity with the terms of the proviso". See also, pp. 35-40. In its brief as *Amicus Curiae* in *Amalgamated Clothing Workers* v. *Richman Brothers*, No. 173, October Term, 1954, p. 13, the Board said that Section 10(a) "specifies the limited circumstances under which the Board may grant the states authority to regulate in the pre-empted field."

Because no state has as yet brought its law, insofar as it regulates the labor relations matters with which the Act deals, into sufficient conformity with the national Act, the Board has found it impossible to cede jurisdiction to the states pursuant to the proviso. NLRB, *Thirteenth Annual Report* (Gov't Print. Off., 1949), p. 18; Report of the Joint Committee on Labor Management Relations, No. 986, Pt. 1, 80th Cong., 2nd Sess., p. 30, quoted, pp. 80-81, *infra*. Recognizing that the limitations which Congress imposed as conditions precedent to cession restrict the Board's power to vest jurisdiction in the states, the Board, as we have seen, has acknowledged that it cannot defeat those limitations by attributing to its mere administrative declination to process cases the effect of ceding jurisdiction to the states. The "National Board cannot do by abdication what it cannot

do by agreement." *New York State Labor Relations Board* v. *Wags Transportation System,* 130 N. Y. Supp. 2d 731, affirmed *per curiam,* 284 App. Div. 883, 134 N. Y. Supp. 2d 603.

C. States May Not Impair the Exercise of Rights Guaranteed by the Act, or Apply Policies Inconsistent With the Policies of the National Act, to Disputes Covered by the Act Over Which the Board Administratively Declines to Assert Jurisdiction.

Those who argue that the Board's administrative declination should be equated to total withdrawal of federal regulation of labor relations in the enterprises involved overlook the fact that Congress laid down "substantive rules" (*Garner* v. *Teamsters' Union,* 346 U. S. 485, 490) which it intended to govern the conduct of the parties to all labor disputes within the reach of federal power. "Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480. It is the national Act itself, not the Board, which creates the rights and imposes the obligations which bind employers, employees and labor organizations. In this, as in other statutes which establish rules of conduct, Congress presupposed that its rules would be observed by most law abiding citizens without resort to sanctions for enforcement.

That Congress vested in the Board, rather than in courts generally, exclusive primary jurisdiction to construe, apply and enforce its rules "carries implications of exclusiveness" (*Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 476), which normally preclude the states from enforcing even identical rules of their own. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U. S. 953; *International Union, etc.* v. *O'Brien,* 339 U. S. 454, 456, 457.

The legislative history of both the Wagner and the Taft-Hartley Acts shows that Congress chose to centralize administration for the purpose of achieving uniform interpretation of its rules throughout the Nation. S. Rep. No. 573, 74th Cong., 1st Sess., p. 9; H. R. 3020, p. 40. As this Court pointed out in *Bethlehem Steel Corp.* v. *New York State Labor Relations Board,* 330 U. S. 767, 773, "the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own." Cf. *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 236. The 1947 Act, in which Congress not only retained exclusive primary jurisdiction in the Board but established conditions pursuant to which the states can acquire jurisdiction to regulate labor problems in local industries under state laws, shows that Congress intended its regulatory scheme to be exclusive. See pp. 69-83, *infra.* The Taft-Hartley Act makes it "clear" that, except as the states may acquire jurisdiction pursuant to the Section 10(a) proviso, "Congress occupied this field and closed it to state regulation." *Amalgamated Ass'n., etc.* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 390.

Even putting aside, *arguendo,* the evidence that Congress intended its regulatory scheme to be exclusive, the Board's declination for administrative reasons to entertain a case of alleged violation could, at most, leave the states free to invoke and enforce only rules consistent with those which Congress enacted. The Board's declination could not empower the state to relieve the parties of their obligations under federal law, or authorize application to them of rules conflicting with the federal. Preemption aside, "Obvious conflict, actual or potential, leads to easy judicial exclusion of state action." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. at 480.

That unavailability of the Board's processes to remedy a violation does not eliminate the national Act so as to authorize application of inconsistent state policies was decided by this Court last term in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74:

> Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.
>
> The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them.

In the *Arkansas Oak Flooring* case, it was held that the rights conferred by Section 7 of the Act remained effective and intact even though the labor organization involved refused to comply with Section 9(h) of the Act, and the Board was therefore barred by the provisions of the Act itself from according a remedy to the union for violation of those rights. Surely, the Board's voluntary withdrawal for "budgetary or other reasons best known to the NLRB" (*Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 662 (C. A. 10)), does not have a more drastic impact on the rights which the statute guarantees than does withdrawal necessitated by Congress' judgment that effectuation of important national interests requires it.

Congress relied only in part on the Board to enforce national labor policy in the areas covered by the Act. Al-

though the rights guaranteed in Section 7 are conferred "generally on employees and not merely as against the employer", Congress authorized the Board to impose "sanctions on the employer alone". *Hill* v. *Florida*, 325 U. S. 538, 545. This Court "has ruled that a State may not prohibit the exercise of rights which the federal Acts protect". *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468, 474; *International Union etc.*, v. *O'Brien*, 339 U. S. 454; *Amalgamated Association etc.*, v. *Wisconsin Board*, 340 U. S. 383; *Thomas* v. *Collins*, 323 U. S. 516, 542; *Arkansas Oak Flooring* case, *supra*. The states do not acquire authority to prohibit the exercise of rights which the Act protects merely because the Board declines, for reasons grounded in its own budgetary and other administrative considerations, to protect them against employer invasion. Protection of those rights against state intrusion is established by the statute and is effectuated independently of the Board. Since protection does not depend upon the Board's exercise of its powers, the Board's declination to act cannot impair the rights.

Many other aspects of the national labor policy which Congress embodied in the Act do not depend upon the Board's exercise of its powers for their implementation. For example, in Section 14(a) Congress provided that although "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization", nevertheless, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."[22] If the Board's declination were treated as

[22] The proviso to Section 14(a) shows that Congress understood that by removing supervisors from the category of employees it was exempting relations between employers and supervisors from the coverage of the Act and hence from the "field" which the federal Act occupies. Congress knew that, having left in this

the equivalent of withdrawal of the Act's coverage from employers over whom the Board refused to assert its jurisdiction, the states would be free to apply to such employers local laws compelling bargaining with supervisors. Such a result obviously would conflict squarely with Congress' determination that such state laws shall not apply to any employer who is reached by Congress' power under the Commerce Clause.

In Section 303 of the Labor Management Relations Act, Congress made it "unlawful" for labor organizations "in an industry or activity affecting commerce" to engage in the conduct which Section 8(b)(4) of the national Act prohibits as an unfair labor practice. In Section 303 Congress gave parties injured by such conduct the right to sue for damages only in any court of appropriate jurisdiction, state or federal. If the Board's jurisdictional policy standards were regarded as an effective declaration that the national Act is inapplicable to employers over whom the Board declines to assert jurisdiction, such employers would be left without the remedy in damages which Congress gave them, and totally without remedy in those states which do not regard as illegal conduct which Section 8(b)(4) and Section 303 outlaw.[23]

Similarly, Congress' authorization of suits in the federal courts for "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act" (Section 301), and its outlawry of payments to "any representative" of

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portion of the field which it left unoccupied, the states would be free to apply their own policies unless Congress indicated that it intended to prohibit state regulation. Accordingly, it incorporated such a prohibition in Section 14(a) to make it clear that it was indifferent to "no law" policy on the merits, and not because it desired to leave the issue. See p. 64, *infra*; *cf. Utah Labor Relations Board* v. *Utah Valley Hospital*, .. Utah .., 235 P. 2d 520.

[23] Restatement of Torts, Vol. IV, Sections 802-804.

"employees who are employed in an industry affecting commerce" (Section 302), in no wise depend for their applicability upon the Board's discretionary determination to assert or not assert the jurisdiction which the Act confers upon it.

It is because the federal Act itself imposes the operative regulation that even under the Wagner Act, before Congress adopted the proviso to Section 10(a), the Government recognized that the Board's declination to process unfair labor practice cases for budgetary reasons could not be equated to the failure of an administrative agency to adopt regulations concerning a matter which Congress empowered the agency to regulate. See Brief for the United States as *Amicus Curiae* in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, pp. 36-37. In the latter cases, "where effective regulation must wait upon the issuance of rules by an administrative body • • • this Court has usually held that the police power of the state may be exercised." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 773-774. But state power survives in those cases only because until the agency acts there is no federal rule with which state rules or policies can conflict. Where, as here, there is potential conflict between federal rules and inconsistent state rules and policies supersedure of state power is required at least to the extent that the states might apply rules or policies inconsistent with the federal Act.

Of course, where the national Board does not decline to exercise its jurisdiction, state power must be precluded even though the state seeks to apply policies and procedures identical with the federal. For even if the rules and policies are the same the two agencies, state and federal, each exercising discretion, "might come out with • • • conflict-

ing" determinations.[24] "The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem* case, *supra*, 330 U. S. 767, 775, 776; *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 26. The Board's declination, for as long as it continues, eliminates the danger that state action in the dispute would be "useless or vain." But it does not eliminate the danger that the state may apply to the dispute rules, policies or procedures inconsistent with the federal.

Recognizing this, the Government in its brief in the *Bethlehem* case, No. 55, Oct. Term, 1946, p. 69, said: "In this field in which the national Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National Statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10(a)." Such an exception would have meant, of course, that state laws embodying policies inconsistent with the national Act could not be applied in this area. If this Court had adopted the theory thus urged by the Government, and if Congress had not, in the 1947 amendments, dealt with the question, issues might have arisen in each case in which a state attempted to apply its own law to a dispute over which the Board declined to assert jurisdiction whether the state law was consistent or inconsistent with the national Act. We illustrate the nature of the problems which such a rule would have presented in the next section of this brief. In the following section we demonstrate that Congress, inferring

[24] Cf. Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, p. 53: "Even when the statutes and administrative policies are the same, cases may be decided differently."

from the decision of this Court in the *Bethlehem* case that no state laws, even entirely consistent ones, could be applied in the areas over which the Board declined jurisdiction for budgetary or other administrative reasons, drafted the proviso of Section 10(a) to enable the states to assert jurisdiction in this limited area, but only upon delegation from the Board, thereby assuring that only consistent state laws would apply.

II.

OHIO LAW GOVERNING LABOR DISPUTES, AS APPLIED IN THIS CASE, IS INCONSISTENT WITH THE NATIONAL ACT.

The Court of Appeals held that the picketing was unlawful because (R. 165) its purpose was "to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes." This, said the court, brought it into conflict with the public policy of Ohio (R. 164): "that employers may not be picketed for the purpose of coercing their employees to join a union." Purporting to demonstrate that Ohio's labor policy parallels federal policy, the court declared (R. 165) that, because of its purpose, the picketing would be an "unfair labor practice" under the national Act.

Analysis demonstrates, however, that Ohio's policy, as applied to the facts of this case, is in sharp conflict with Congress' policies.

A. The Courts Below Entirely Overlooked Fairlawn's Unfair Labor Practices Which Federal Law Condemns.

The evidence shows that when Ekers determined to break off negotiations and terminate relations with the Union, he embarked upon a course of conduct destructive of his employees' freedom of self-organization. Ekers

told fifteen "key" employees that he did not want them to join the Union and threatened them with the loss of overtime and Sunday work if he were forced to sign a Union contract (pp. 4-5, *supra*). Admittedly, after the strike began, Fairlawn's store managers, on company time and property, circulated and induced employees to sign petitions repudiating the Union and supporting management's position in the dispute (*supra*, p. 5). It was also admitted that Fairlawn solicited and obtained job resignations from several employees, suggesting that they should regard membership and activity in the Union as incompatible with employment at Fairlawn (*supra*, p. 5). The Court of Appeals concluded, nevertheless, that Fairlawn's employees "could join or not join [the Union], so far as management was concerned" (R. 159).

Under the National Labor Relations Act, as construed by the national Board and the federal courts, Fairlawn's conduct which the courts below thus sanctioned, constituted flagrant employer unfair labor practices. To instruct employees not to join a union and threaten them with loss of work opportunities if the employer does not succeed in thwarting consummation of a union contract is the very coercion of employees which Section 8(a)(1) condemns. The circulation of anti-union petitions among employees on company time and property by the employer's responsible supervisors is a classic unfair labor practice.[25] The Board and the federal courts recognize that

[25] *Red Rock Company*, 84 NLRB 521, 524-525, enforced, 187 F. 2d 76 (C. A. 5), cert. denied, 341 U. S. 950; *Royal Palm Ice Co.*, 92 NLRB, 1295, 1296, 1310, enforced, 193 F. 2d 569 (C. A. 5); *National Labor Relations Board* v. *United Biscuit Co.*, 208 F. 2d 52, 55 (C. A. 8); *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 661 (C. A. 2), enforcing 25 NLRB 1362, 1371; *Ward Body Works, Inc.*, 103 NLRB 680, 682; *Northern Crate & Lumber Co.*, 105 NLRB 218, 221; *Continental Desk Co.*, 104 NLRB 912, 913, 916; *Consolidated Machine Tool Corp.*, 67 NLRB 737, 738, 739; *Gagnon Plating & Mfg. Co.*, 103 NLRB

the mere handing of such petitions to employees by supervisors on company time and property is "tantamount to compulsion to sign them," and that the intimidatory effect is not vitiated even if employees are ostensibly left free not to sign and even if the employees later testify that they signed of their own volition and were not coerced into doing so. *Red Rock Company,* 84 NLRB 521, 524, 525. See also cases cited note 25, *supra;* cf., *National Labor Relations Board* v. *Donnelley Garment Co.,* 330 U. S. 219, 230, 231. Here the employees themselves recognized that they were coerced into signing (R. 134, 136, 138). Fairlawn's action in inducing Union sympathizers to sign statements of resignation would similarly be regarded under the national Act as illegal intimidation (R. 89). The resignations resulting therefrom would have been deemed "constructive discharges" rather than voluntary terminations of employment.[26]

263, 268. See also, *Advance Stamping Co.* v. *Local 267, UAW,* decided June 18, 1956 (Cir. Ct., Livingston County, Mich.), 38 LRRM 2382, 2386-2387, 2398-2399, holding that an employer's act in circulating among employees for signature a petition calling for an NLRB election is interference, coercion and intimidation, violative of the "employees' right to self organization" and an "unfair labor practice" under the national Act.

[26] *Marathon Electric Mfg. Corp.,* 106 NLRB 1171, 1173, 1175, 1199; *East Texas Motor Freight Lines,* 47 NLRB 1023, 1029, aff'd. 140 F. 2d 404 (C. A. 5); *Bausch & Lomb Optical Co.,* 107 NLRB 790, aff'd., 217 F. 2d 575 (C. A. 2).

B. Being the Fruit of Fairlawn's Unfair Labor Practices, the Evidence on Which the Ohio Courts Relied to Establish the Union's Lack of Majority Support Among the Employees Would Not Be Deemed Probative or Even Admissible for That Purpose Under the Policies of the National Act.

To establish that a majority of the employees did not desire to be represented by the Union, the courts below relied upon the petition which 41 out of 50 employees had signed at Fairlawn's instance on February 10, 1954, and upon the resignation of Union adherents from employment (R. 151, 159, 163, 165). As we have seen, the national Board and the federal courts would hold that both the petition and the resignations reflected intimidation by Fairlawn, not the uncoerced desires and acts of the employees. Accordingly, they would not permit the employer even to adduce such evidence to establish the union's lack of majority status. See cases cited note 25 *supra*. On May 10, 1952, when Fairlawn initially recognized the Union, it apparently did not even challenge the Union's majority, and no evidence was adduced to rebut the normal presumption that that agreement when made, was lawful.[27] The normal presumption that the Union's majority status continued would not have been deemed rebutted by the evidence of defections which Fairlawn induced by its unfair labor practices. As this Court said in *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687, an employer "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had in-

[27] The record does not even show how many employees there were in the bargaining unit on that date. The number, 50, represents Fairlawn's payroll as of February, 1954; it does not show what changes may have taken place in the size of the unit in the interval.

duced by unfair labor practices even though the result was that the union no longer had the support of a majority. * * * [The employer's] refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of § 8(a) (1) and (5) of the Act." Cf. *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107.

The conflict between the national Act's policy and Ohio's treatment of employer induced repudiation of a labor organization is highlighted by the decision of the Court of Appeals below in *Anderson* v. *Retail Clerks' Union*, decided May 23, 1956 (Ohio Ct. App., Ninth Judicial District, per Hunsicker, J.), 38 LRRM 2324, the facts of which the court considered "similar" to the instant case, and to which it applied the same rule. 38 LRRM at 2325, 2326. In the *Anderson* case, the opinion recites, the Union was admittedly the recognized exclusive bargaining agent of the grocery department employees. Prior to the expiration of its collective bargaining contract with the store, the employer "told the employees * * * that [he] did not wish to have a union store. * * * he asked each of such employees individually, if he or she desired to leave the union, to sign a paper writing indicating he or she wished to withdraw from the union. Six members of the grocery department signed this paper, and three refused to sign." The employer thereafter refused to bargain with the Union. The court held that these signatures evidenced the desire of "the majority of the employees * * * that no union represent them in their dealings with the employer," and that, in consequence, the union had lost its status as bargaining agent of the employees of the store, and the employer was justified in refusing to bargain further with the union (38 LRRM at 2326).

If the principles of the national Act had been applied

in the *Anderson* case, the employer would have been ordered both to cease and desist from illegal interference and to bargain with the Union. Moreover, the Union's picketing for recognition after the employer refused to bargain would have been held protected by Section 7.[28] Under Ohio law, not only was the employer's illegal interference excused, and no obligation imposed upon him to bargain, but the Union was enjoined from picketing.

Similarly, if the principles of the national Act, rather than Ohio law, had been applied in the instant case, at minimum, Fairlawn would have been found guilty of unfair labor practices and would have been ordered to cease and desist from its illegal interference. If Fairlawn had charged before the Board, as it alleged in the state courts, that the Union's strike and picketing was designed to force Fairlawn to enter into a union-shop contract, the General Counsel might well have refused to issue a complaint. For the strike resulted from Fairlawn's total refusal to negotiate further with the Union and from its unfair labor practices, not from mere rejection of a union-shop proposal. There was no evidence that a strike would have occurred at all if Fairlawn had offered to sign a contract without a union-shop clause, or even if Fairlawn had been willing to continue negotiations with the Union. (See R. 123). Cf. *Medford Building and Construction Trades Council*, 96 NLRB 165, 166.

Moreover, even if it be assumed that one of the Union's objectives was to obtain a union-shop contract, Fairlawn presented no admissible evidence that the circumstances

[28] Under the national Act, strikes and picketing in protest against employer unfair labor practices are clearly protected by Section 7. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270. Congress rejected the provision of the House bill (Section 12 (a)(13)(c)(ii)), which would have outlawed concerted activities to remedy conduct for which the Act provided an administrative remedy, p. 49, *infra*.

were such as to make such a demand illegal. Since a union-shop demand is illegal under the national Act only if the Union lacks a majority, the Board holds that the burden of proving lack of majority rests with the charging party; the Union need not come forward with evidence to establish its majority status until a *prima facie* case has been made out against it. *International Metal Products Company*, 104 NLRB 1076, 1078. For the reasons already stated, the evidence offered by Fairlawn to establish the Union's lack of majority would not have served, under the national Act, to establish even a *prima facie* case.

On the contrary, the General Counsel might have regarded Fairlawn's refusal to continue negotiations as sufficient under the circumstances to warrant issuance of a complaint charging Fairlawn with illegally refusing to bargain. Even if the presumption of continuing majority were not considered adequate to establish the Union's majority prior to February 11, 1954, the General Counsel might have considered sufficient the affirmative evidence which the Union offered to show that after the strike began it represented 26 of Fairlawn's employees (R. 188A).

C. Ohio Law Outlaws Peaceful Strikes and Picketing for Organizational and Recognition Purposes Which Federal Law Sanctions.

If, however, the national Board had found, as did the courts below, that the Union did not have a majority and that the object of the strike and picketing was to cause Fairlawn to enter into a union-shop contract, it would have entered a different and far narrower order than did the courts below. On those findings the Board would have held the Union's conduct violative of Section 8(b)(2) of the Act, which prohibits a labor organization from causing or attempting to cause an employer to discriminate

against an employee in violation" of Section 8(a)(3). *Denver Building and Construction Trades Council* (*Henry Shore*), 90 NLRB 1768, 1770; *Medford Building and Construction Trades Council*, 96 NLRB 165; cf. *Garner* v. *Teamsters' Union*, 346 U. S. 485. The Board would have carefully limited its order so as to enjoin "only picketing engaged in, to compel the employer to discriminate against employees in violation of Section 8(a)(3) of the Act", deliberately leaving the Union free to picket for "other purposes". *Denver* case, *supra*, 90 NLRB at 1770.

The reason for, and the importance of such limitation is clear. In adopting the Taft-Hartley Act, Congress decided that even stranger picketing for organizational purposes should not be made illegal, and that strikes and picketing for recognition should be made illegal only if they occur after another labor organization has been certified as exclusive bargaining agent of the unit involved. Section 12(a)(2) of the House bill, (H. R. 3020, 80th Cong., 1st Sess.), would have outlawed:

> Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

Section 12(a)(3)(C) would have made it illegal for a labor organization to call or engage in "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under Section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order or direction issued pursuant to any law."

The minority report objected to these provisions on

the ground that they would "wholly destroy labor's right to strike as an organizational weapon" (H. Minority Rep. No. 245 on H. R. 3020, p. 66). The Senate bill contained no comparable provisions and these provisions of the House bill were rejected in conference. The only limitation imposed by the Act as finally adopted upon organizational and recognition strikes and peaceful picketing was contained in Section 8(b)(4)(C). The Report of the House Committee states that "the primary strike for recognition (without a Board certification) was not prohibited." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43; S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess., p. 22; Report of the Joint Committee on Labor-Management Relations, No. 986, Pt. 3, 80th Cong., 2d Sess., p. 71, quoted in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, p. 75, note 14.

Fear that it might open the door to illegalization of "the right to strike for recognition purposes" (93 Cong. Rec. 4840, in 2 Leg. Hist. L. M. R. A. 1359), was one of the factors which led to rejection by the Senate of the Ball amendment, which would have authorized private parties to bring suit in the federal courts for injunctive relief. 93 Cong. Rec. 4757, 4847, in 2 Leg. Hist. L. M. R. A. 1323, 1370. Senator Morse, one of the leading opponents of the Ball amendment, pointed out that preservation of the right to strike for recognition, in the absence of a rival certification, was necessary to permit employees to protect themselves against unfair labor practices and other "provocative action" by their employer, which may and frequently does take place "when a union has just begun its organizing efforts", prior to achieving majority status. He observed that to deny the right to strike for recognition until the union had gained a majority, or until it had been certified by the Board, would "award a bonus to those employers who engage in the most outrageous anti-social con-

duct". 93 Cong. Rec. 4840-4841, in 2 Leg. Hist., L. M. R. A. 1359-1360.

Section 8(b)(1) which makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7", does not outlaw peaceful strikes and picketing whether by minorities or majorities. That Section was added to the Senate bill by amendment on the floor. 93 Cong. Rec. 4442, in 2 Leg. Hist. L. M. R. A. 1217, Supplemental Statement of Senators Ball, Taft, Donnell, Jenner and Smith, S. Rep. No. 105, 80th Cong. 1st Sess., p. 50. Its purpose was to prohibit the use of force and violence, mass picketing and similar conduct, tortious *per se*, which had been outlawed in Section 12(a)(1) of the House bill. *National Maritime Union of America*, 78 NLRB 971, 982, *et seq.* Senator Morse opposed the provision which became Section 8(b)(1)(A) (93 Cong. Rec. 4431 in 2 Leg. Hist. L. M. R. A. 1197-1198) on the ground that "it will have the effect of outlawing organizational strikes and strikes for recognition. In fact, it could easily be construed to prohibit all types of strike in situations where some of the employees are opposed to the strike." After quoting from p. 22 of the report of the Senate Committee, cited p. 50, *supra*, Senator Morse continued:

> Thus the committee did not intend to outlaw all types of primary strikes; in fact, it was careful to point out that organizational strikes were not prohibited, because sometimes they are justified.
>
> Since it has frequently been held that strikes are a form of coercion, it follows, Mr. President, that the pending amendment would outlaw all strikes designed to further organizational activities. While I am of the opinion that unions should utilize the election machinery of the act wherever possible, rather than resort to strike action in an attempt to solidify organization, it must be recognized that organizational strikes have a legitimate place in some situations.

Senator Taft, one of the sponsors of the amendment, took the floor specifically to deny that Section 8(b)(1)(A) was intended to or would affect peaceful strikes or peaceful picketing. 93 Cong. Rec. 4436-4437, in 2 Leg. Hist. L.M.R.A. p. 1207. He said:

> The Senator says it will slow up organizational drives. It will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.
>
> Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.

In view of this legislative history, the national Board holds that Section 8(b)(1)(A) does not outlaw minority strikes for recognition (*National Maritime Union of America*, 78 NLRB 971, 986), or organizational picketing by non-employees (*Painters District Council No. 6*, 97 NLRB 654, 655, 666-668; stranger picketing to induce employees to withdraw decertification petition). See also *Perry Norvell Company*, 80 NLRB 225, 238-240.[29]

The opinion of the Court of Appeals below shows that

[29] The Board recognizes, of course, that if the objective of the strike or picketing is independently unlawful, participation therein, may, absent mitigating circumstances, warrant denying to employees the "protection" of the Act, i. e., protection through reinstatement with back pay against employer discharge for such participation. See *Perry Norvell Co.*, 80 NLRB at 241.

it assumed that under the national Act a labor organization could lawfully strike and picket for the purpose of obtaining recognition only after it had been chosen as bargaining agent by a majority of the employees in an election conducted by the Board (R. 164). It assumed that until it had been chosen by a majority, a labor organization could not lawfully strike or picket at all. These assumptions, as we have seen, are quite false. See also, *Amalgamated Meat Cutters, etc.* v. *Johnson*, 178 Kan. 405, 286 P. 2d 182; cf. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72, note 8. As the Report of the Joint Committee on Labor Management Relations put it (80th Cong., 2nd Sess., pp. 70-71):

> A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.

The opinion in this case (R. 163), and the opinion of the same court in *Anderson* v. *Retail Clerks Union*, 38 LRRM 2324, 2326, which quotes and relies upon the instant opinion, also show that Ohio treats as coercive and illegal peaceful picketing designed to induce employees to join a labor organization. Thus Ohio has adopted the very policy on peaceful organizational picketing which Congress rejected. And the legislative history shows that Congress rejected that policy "on the merits" (*International Union, etc.* v. *O'Brien*, 339 U. S. 454, 458, note 5), "as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 394-395.

In addition, although acknowledging that the Union had at all times acted in the good faith belief that its activi-

ties to aid unionization were entirely lawful (R. 155), the trial court invoked the conspiracy doctrine to hold the Union's conduct illegal. This Court has expressly held that: "Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce." *International Union U. A. W.* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 257-258.

Both courts below found that the strike and picketing herein did not arise out of a "labor dispute" (R. 151-155, 161-165) by defining that phrase far more narrowly than Congress defined it in the Act. Section 2 (9); see also p. 49, *supra.*

Finally, the courts below characterized as a "secondary boycott" the direct inducement of other employers to cease doing business with Fairlawn (R. 155-156, 165). Under the national Act, Congress prohibited as secondary boycotts only union inducement of employees of neutral employers to strike against their employer; it left unions free to induce secondary employers to cease doing business with the primary employer by all other means. *Schatte* v. *International Alliance, etc.,* 182 F. 2d 158, 165 (C. A. 9), cert. denied, 340 U. S. 827; *Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906, 911 (C. A. 2); *Sealright Pacific, Ltd.,* 82 NLRB 271; *Ferro-Co Corp.,* 102 NLRB 1660. Thus, the conduct of petitioner and its allies in this case with relation to Fairlawn's suppliers, which Ohio's policy condemns, is permissible under the national Act's policy.

Pursuant to Ohio's inconsistent policies, the courts below entered a decree which prohibits the union from engaging in any and all peaceful picketing, an order far more restrictive than the Board could or would have issued even if it had made identical findings as to the purpose

of the picketing, pp. 48-49, *supra*. As this Court held in *Garner* v. *Teamster's Union*, 346 U. S. 485, 500:

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.[30]

D. Ohio's Policy of Permitting Employers to Resort Directly to the Courts for Injunctive Relief Against Peaceful Strikes and Picketing Conflicts With Congress' Determination That Private Parties Should be Barred from Direct Resort to the Courts for Injunctive Relief in Such Cases.

One of the most important policy questions which Congress decided when it enacted the Taft-Hartley Act was whether employers should be authorized to apply to the courts directly for injunctive relief against strikes and peaceful picketing for objectives which the Act defined as unfair labor practices. A minority of the Senate Committee, led by Senator Ball, proposed to permit employers to bring suit in the federal courts to enjoin secondary boycotts and jurisdictional strikes. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 54-56. They urged that to limit employers to recourse to the Board would provide only a "weak and uncertain remedy for those injured by clearly illegal strikes." The proponents pointed out that relief would depend "upon the decision of the National Labor Relations Board as to whether any action shall be taken;" and that employers acting on their own initiative could obtain faster relief than the Board could make available.

[30] We shall demonstrate in Point IV, below, that the fact that at two of the stores the picketing proceeded on the employer's property and was viewed by the courts below as a trespass cannot justify Ohio's invasion of rights which Sections 7 and 13 of the Act guarantee.

They also contended that injunctions against illegal purpose strikes would not involve "continuous supervision and contempt charges" but would be "completely effective". In addition, they urged that persons wronged by illegal strikes should, as a matter of principle, be accorded the right to seek their own remedy and control their own litigation in the courts. 93 Cong. Rec. 4837, 2 Leg. Hist. L. M. R. A., 1353.

Opposition to the proposal proved overwhelming. A majority of the Senate Committee voted it down (93 Cong. Rec. 4131, 2 Leg. Hist., L. M. R. A. 1054). Senator after Senator took the floor to warn that to permit employers to apply to the courts for injunctive relief against peaceful strikes and picketing would reintroduce "the flagrant abuses which brought about the enactment of the Norris-LaGuardia Act" (Senator Ives, 93 Cong. Rec. 4839, 2 Leg. Hist. L. M. R. A., 1356). Senator Ellender opposed the amendment on the ground that "the injunctive process was resorted to by employers in thwarting strikes and in denying the right of labor to organize". 93 Cong. Rec. 4131, 4132, 2 Leg. Hist. L. M. R. A. 1054. See also statements of Senators Thomas and Murray, 93 Cong. Rec. 4757-4770, 4845-4846, 2 Leg. Hist. L. M. R. A., 1324-1346, 1368. Senator Ellender also argued that Congress should not be overly concerned with the efficacy of the remedy because (93 Cong. Rec. 4838, 2 Leg. Hist., L. M. R. A. 1356): "the fact that we make jurisdictional strikes and secondary boycotts unfair labor practices will act as a deterrent and few violations will come to the attention of the Board." It was pointed out, too, that one of the major objects of the bill was to equalize the rights of employers and employees acting through labor organizations, and that it would be unjust to permit employers to resort to the courts for injunctive relief against union unfair practices if employees were denied the privilege of

obtaining relief through the courts against employer unfair practices. 93 Cong. Rec. 4838, 4845-4846, 2 Leg. Hist. L. M. R. A. 1355, 1368. Senator Morse observed that labor problems are highly complex and that continuous attention is necessary to achieve the expertness necessary to deal adequately with them. Judges, he said, had not "the desire, or the time," to acquire the special competence the field required. (93 Cong. Rec. 4841-4842, 2 Leg. Hist. L. M. R. A. 1360-1361.) Senator Smith stated (93 Cong. Rec. 4843, 2 Leg. Hist. L. M. R. A. 1364) that Congress was seeking "to improve the relations between management and labor, and not to raise new barriers through the feeling brought about by lawsuits." He continued:

> I do not believe that the way to deal with this problem in the first instance is by seeking injunctions. I believe that the problem should be handled by the Board, which is distinctly charged with the responsibility of being a judicial board to take care of problems on both sides of the controversy. I think we are justified in experimenting with that procedure before we go back to all the old legal remedies, including especially the injunctive remedy, which caused so much trouble in the early labor cases.
>
> I admit that secondary boycotts and jurisdictional strikes are indefensible; but questions will arise with respect to which discretion may be needed, and I believe that the Board can serve a very useful function, even in cases of secondary boycotts and jurisdictional strikes.

For all of these reasons, Congress rejected the "court approach" in favor of the "administrative law approach." 93 Cong. Rec. 4132, 2 Leg. Hist., L. M. R. A. 1057; 93 Cong. Rec. 4847, 2 Leg. Hist., L. M. R. A. 1369. It decided that injunctive relief against unlawful purpose strikes and picketing should be made available only through "the Board, acting in the public interest and not

in vindication of purely private rights." S. Rep. No. 105 or S. 1126, p. 8. "In such cases the injunction can be obtained only through the National Labor Relations Board." 93 Cong. Rec. 6446, 2 Leg. Hist. L. M. R. A. 1544.

Impressed that "opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional disputes, seemed to be so strong," Senator Taft offered a substitute amendment to permit employers to sue only for damages when injured by conduct characterized as union unfair labor practices by Section 8(b)(4). 93 Cong. Rec. 4843-4844, 2 Leg. Hist. L. M. R. A. 1365. This would, he urged, be "a powerful deterrent" to such conduct (*Ibid.*). Only after Senator Taft had assured the Senate that this provision would not open the door to employers to obtain injunctive relief was the amendment, Section 303 of the Act, adopted. 93 Cong. Rec. 4872-4874, 2 Leg. Hist. L. M. R. A. 1396-1400. See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 188-189 (C. A. 4).

By permitting employers to resort directly to its courts to obtain injunctive relief against strikes and peaceful picketing Ohio has adopted the very policy which Congress rejected as being incompatible with its program of improving "relations between management and labor" in industries subject to the national Act, p. 57, *supra*. Congress prohibited employers from resorting to the injunctive process for fear that the process would be used in "thwarting strikes and in denying the right of labor to organize," p. 56, *supra*. In adopting the "court approach", Ohio ignores its inherent dangers to federally protected rights, dangers which Congress deemed decisive against it.

Congress thought it essential, in order to deal fairly with

labor disputes affecting commerce, that an administrative agency which could impartially investigate "both sides of the controversy", p. 57, *supra*, and would act to vindicate only public, not private, rights, stand between the employer and injunctive relief through the courts. The legislative history shows that Congress believed, as this Court recently observed, that "Orders which originate in state boards and become effective through the state judiciary should give more careful protection to the rights of labor than the purely judicial orders of a court." *United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board and Kohler Co.*, 351 U. S. 266, 274. The policy of any state which adopts the "court approach" to the handling of matters in the field covered by the Act is by that token alone inconsistent with the national Act.

III.

THE TERMS AND THE LEGISLATIVE HISTORY OF THE PROVISO TO SECTION 10(a) SHOW THAT THE STATES MAY ACQUIRE JURISDICTION TO REGULATE UNFAIR LABOR PRACTICES OVER WHICH THE BOARD IS VESTED WITH JURISDICTION ONLY BY CESSION FROM THE BOARD. IN THE ABSENCE OF A CESSION AGREEMENT STATE POWER REMAINS PRECLUDED WHETHER OR NOT THE BOARD CHOOSES TO ASSERT ITS JURISDICTION.

Questions of federal preemption—whether state power to regulate conduct concerning which Congress has legislated is or is not superseded—turn, of course, on the intention of Congress. It is only where Congress has been silent as to whether its legislation shall or shall not exclude state regulatory power over the subject that resort may be had to implications or consequences to determine whether the federal regulatory scheme is exclusive or allows state regulation of the same conduct. *Rice* v. *Santa*

Fe Elevator Corporation, 331 U. S. 218, 236. It is for Congress to determine whether state regulation is a "blessing" or a "bane", and only when Congress has failed to deal with that issue is it for the courts to decide on policy considerations.

Congress frequently is silent as to the effect of its legislation on state laws. And in some cases, although the "implications of exclusiveness" are clear, difficult questions result from the failure of Congress to define the scope of the field which the federal legislation is intended to occupy. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 476. But on the phase of the preemption problem at issue here—whether the states may apply law or policy which overlaps the provisions of the national Act to cases which arise in borderline industries over which the Board for administrative reasons declines to assert jurisdiction—Congress spoke clearly and unequivocally when it enacted the proviso to Section 10(a).

The problem was focused for Congress by the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767. In that case, the Court held that New York was without power to compel an employer to bargain with a unit of supervisors, even though at the time the case was decided New York's policy on that issue was identical with federal policy. The Court rejected the state's contention that "while federal power over the subject is paramount, it is not exclusive • • • until the federal power is actually exercised as to the particular employees, State power may be exercised," 330 U. S. 767, 771, 776.

Anticipating the instant problem, the Court noted that it was the national Board's practice "to decline jurisdiction in certain types of cases, for budgetary or other reasons • • •." 330 U. S. at 776. It also took note of the

National Board's practice of ceding to states which had enacted laws consistent with the Wagner Act, jurisdiction to handle cases in these local industries over which the Board customarily refused to assert jurisdiction for budgetary reasons (*ibid.*). These cession agreements between the national Board and state boards, the court characterized as a "commendable effort to avoid conflict" (*ibid.*). But the court reserved the question whether the Board was empowered by the Act thus to cede jurisdiction to the states to regulate relations which "federal power reaches" (330 U. S. 767, 770), but which the Board administratively eschews. It refrained from passing on that question because in that case the Board's declination was not based on budgetary or other administrative considerations but on a policy relating to the merits of the issue, and "the National Board made no concession or delegation of power [to the State] to deal with this subject." 330 U. S., at 776.

However, in a concurring opinion in which Mr. Justice Murphy and Mr. Justice Rutledge joined, Mr. Justice Frankfurter said (330 U. S., at 779):

> I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations.

Later, in the same opinion, Mr. Justice Frankfurter pointed out that "The vast range of jurisdiction which the National Labor Relations Act has conferred upon the

Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, untold small enterprises are subject to the power of the Board." After pointing out that "in their individualized aspects" labor relations in these enterprises are "equally the concern of their respective localities", the opinion cited the Board's Annual Reports which show "increasing arrears" in explanation and justification of the Board's desire "to share burdens" with states which seek to enforce a common policy. Noting that the national Board in its brief had asked the Court to enunciate a rule which would permit the states to enforce consistent laws where the Board declined to assert jurisdiction, *supra*, p. 41, Mr. Justice Frankfurter concluded that the majority's opinion "would forbid the aid which the agency of Congress seeks in carrying out its duty. It is surely a responsible inference that the result will be to leave uncontrolled large areas of industrial conflict." 330 U. S. 767, 784.

The *Bethlehem* case was decided on April 7, 1947. Ten days later, the Senate Committee reported out S. 1126, containing the following proviso to Section 10(a):

> *Provided*, that the Board is empowered by agreement with any agency of any State or Territory to concede to such agency jurisdiction over any cases in any industry, other than mining, manufacturing, communications, and transportation, except where predominately local in character even though such cases may involve labor disputes affecting commerce, provided the State agency conforms to national policy, as herein defined, in the determination of such disputes.

In conference, the word "concede" was changed to "cede" and the phrase "provided the State agency conforms to

national policy, as herein defined, in the determination of such disputes", was changed to read: "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."[31]

This Court has pointed out that "the purpose of the proviso" to Section 10(a) was "to meet situations made possible by *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H.R. Rep. No. 245, 80th Cong. 1st Sess. 40; S. Minority Rep. No. 105, p. 2, 80th Cong., 1st Sess. 38." *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313. The legislative history of the proviso estab-

[31] Addition of the proviso was the only change which Congress made in Section 10(a) because of the preemption problem. Reference to the Board's power as "exclusive" was eliminated from the second sentence in the Section, but, as this Court recently noted (*United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 271), "The omission was explained in the Conference Report" as a reflection of the new Act's "provisions authorizing temporary injunctions enjoining alleged unfair labor practices [Section 10(j) and (l)] and * * * making unions suable (Section 303)." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52. Because to that extent the Board's power would no longer be exclusive, Congress believed it inappropriate to continue to use that term. Moreover, as the quotation from the Conference Report in the *United Automobile Workers* case shows, 351 U. S. at 271-272, note 8, the purpose of retaining the second sentence of Section 10(a) was to make it clear that in these cases, where the Act vested other tribunals in addition to the Board with jurisdiction, these remedies would be cumulative and that resort to one would not preclude the others. Thus, the legislative history confirms the conclusion of this Court in the *Garner* case, 346 U. S. 485, 492-493, that although the second sentence of Section 10(a) "seems to contemplate a remedy to supplement, rather than to substitute for, existing ones", it was not designed or intended to sanction the application of state law to the kind of union and employer conduct which is regulated exclusively by the provisions of the Act.

lishes unequivocally that Congress enacted it because it believed that even states which enacted statutes identical with the Taft-Hartley Act would otherwise be powerless to regulate the relatively local enterprises over which the Board, for budgetary or other administrative reasons, declined jurisdiction. It enacted the proviso as the alternative to leaving "uncontrolled large areas of industrial conflict," which were subject to federal power, but over which the Board declined to assert jurisdiction.

The House Report (H.R. 245 on H.R. 3020, p. 40), explained that supersedure of state power to deal with conduct within the scope of the Act was necessary "in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. It can readly be seen what mischief might be wrought if, for example, foremen should be subject to state law at the same time that the workers they supervise are subject to national law." The Senate Report stated (S. Rep. No. 105 on S. 1126, p. 26): "Section 10(a): The proviso which has been added to this subsection permits the national Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (*i. e.*, border line insofar as interstate commerce is concerned), provided the State statute conforms to national policy." In the same report, the minority of the Committee said (p. 38):

> (c) *Concession of Federal jurisdiction to States.*—Section 10 (a) adds a proviso to the present act empowering the Board to concede to any agency of any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an effect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems. This pro-

posal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp.* v. *William J. Kelley and H. Myron Lewis, etc.*, decided on April 7, 1947.

The Report of the Conference Committee, H. Conf. Rep. No. 510, on H.R. 3020, p. 52, describes the proviso to Section 10(a) as:

> authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications, and transportation only when the employer's operations are predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act, as interpreted and applied by the Board and by the courts.

This Court has recognized that Congress intended to bar the states from enforcing overlapping state law or policy except pursuant to a cession agreement authorized by the proviso. In *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, the Court said:

> When it amended the Federal Act in 1947, Congress • • • was • • • well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board*, 1947, 330 U. S. 767, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states.

In a footnote to this statement the Court said:

> A proviso of § 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent

> with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation.

The text then continues:

> Congress knew full well that its labor legislation "preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. H.R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947).

In a footnote to this statement the Court cited Section 10(a) and Sections 8(d), 14(b), 202(c) and 203(b) as "examples of congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act."

That the proviso unambiguously precludes the states from enforcing even a policy identical with federal policy except pursuant to a cession agreement with the national Board is highlighted by this Court's reference to it as exemplifying the manner in which Congress supersedes state regulatory power when it desires to do so. "* * * when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U. S. C. (Supp.) § 160(a)." *California* v. *Zook*, 336 U. S. 725, 732.

Analysis of its language, its context and its purpose unite, as we demonstrate below, in confirming what spontaneous reading and the legislative history of the proviso make plain: "refusal by the NLRB to entertain * * * [a] grievance on its merits [does] not of itself alter the pertinent law thereby revesting the state court with authority

to proceed. Amended Section 10(a) of the Act specifically provides * * * the only way state authorities can be vested with authority now within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency." *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663 (C. A. 10).[32]

1. The proviso was designed to clarify the scope of state regulatory power in those industries, "border line insofar as interstate commerce is concerned" (p. 64, *supra*), over which, as "Congress was fully cognizant" (*Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9)), the Board customarily declined to assert the jurisdiction which the Act vested in it. Seeking clarity, if Congress had intended that the Board's declination for budgetary reasons to assert jurisdiction should remove the preemption bar to state action, it would have said so. That conclusion is buttressed by the fact that when, in the same statute, Congress dealt with the respective roles which should be played by federal and state mediation agencies in labor disputes "which would have only a minor effect on interstate commerce," it required the parties involved to notify the state as well as

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[32] Accord: *Capital Service* v. *National Labor Relations Board*, 204 F. 2d 848, 855 (C. A. 9) ("We construe this amendment [of Section 10(a)] as giving to a state a right of enforcement only by an agreement reached by it with the board"); *Food Basket, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America*, decided October 21, 1955, (Court of Appeals of Kentucky) not officially reported, but reported unofficially in 29 C. C. H. Labor Cases ¶ 69,561 pp. 90, 159 n. 1; *Universal Car Co.* v. *Ass'n. of Machinists* (Cir. Ct. Kent County, Mich.), reported unofficially at 35 LRRM 2087; *New York State Labor Relations Board* v. *Wags Transportation System*, 130 N. Y. Supp. 2d 731, aff'd on other grounds, 284 App. Div. 883, 134 N. Y. Supp. 2d 603; *Graybar Electric Company, Inc.* v. *Automotive, Petroleum & Allied Industries Employees Union No. 44*, ... Mo. ...., 278 S. W. 2d 794, 803 (*en banc*).

the federal agency of the pendency of the dispute, and instructed the federal agency to "avoid" mediation efforts "if State or other conciliation services are available to the parties." Labor Management Relations Act, Section 203(b). Thus, differentiating between "matters [which] are to be taken over by the federal government and matters which should be left to the States" (p. 23, *supra*), Congress gave free rein to the states in the field of mediation of local disputes, but imposed conditions upon state regulation of the use by the parties of traditional weapons of economic conflict. It is evident that Congress believed that the national interest would not be jeopardized by state mediation efforts in these local disputes, but that it was necessary, in the national interest, to guard against the danger of application of inconsistent state policies to conduct as to which Congress had adopted a policy of its own. Congress considered uniformity of national labor policy more important than the interest of the states in regulating economic conflict under different policies which the state might prefer.

2. Specification of one method by which the states may acquire jurisdiction to regulate conduct which Congress gave the Board jurisdiction to regulate itself implies that the states may not acquire jurisdiction in any other way. *Inclusio unis est exclusio alteris.* In the present context that inference is particularly valid for Congress was aware of the possibility of permitting the states to acquire jurisdiction by either of two methods—declination of jurisdiction by the Board and cession agreements—and selected only the more restrictive one. It seems beyond challenge that Congress deliberately intended to shut the door to state jurisdiction where the Board did not cede but merely declined to assert its own jurisdiction, for Congress drafted the proviso on the assumption that except as specific authorization was granted by the Act, state power would

not "be operative." *Amalgamated Ass'n.* case, *supra*, p. 66.

3. To permit the states to apply their own laws merely because the Board declines to assert jurisdiction over the labor dispute would defeat the purpose of the limitations which Congress imposed upon the Board's power to cede jurisdiction to the states. The purpose of denying to the Board power to cede jurisdiction unless state law is consistent with the federal Act was to insure "that the national policy will not be thwarted even in the predominantly local enterprises to which the proviso applies." *Amalgamated Ass'n.* case, *supra*, p. 66.

In those industries where the Board fails fully to effectuate the policies of the national Act by declining to assert jurisdiction, national policy may yet be thwarted by the application to the parties of inconsistent state policies. Thus, where the Board declines to afford redress against an employer who discriminates against employees for engaging in concerted activities which Section 7 protects, it fails to accord the full measure of security which Congress intended to attach to the exercise of those rights. Such inaction, however, does not preclude employees from exercising their rights. Application of a state policy which treats such protected concerted activity as illegal and enjoinable does prevent it, and thwarts Congress' policy completely.

The objectives which Congress sought to promote through the policies of the Taft-Hartley Act, as distinguished from the Wagner Act, are particularly susceptible to nullification through application of inconsistent state policies. One of Congress' paramount objectives was to "equalize" the status of employers and labor organizations by treating the conduct of both groups of which Congress disapproved as unfair labor practices. (93 Cong. Rec. 4133, 4204, 4437,

4845, in 2 Leg. Hist. L. M. R. A., 1058, 1118, 1209, 1368.) Application of any state law which illegalized the prohibited conduct of one group but left the prohibited conduct of the other immune to restraint would thwart this basic objective. States like New York, which had enacted statutes patterned after the Wagner Act, would redress employer unfair labor practices but provide no remedy at all against some or all of the conduct of unions which Congress outlawed as unfair labor practices. On the other hand, those states, like Ohio, which had no labor relations statute, and governed labor relations pursuant to common law tort concepts, would provide a remedy for some or all acts of unions which Congress outlawed, but would provide no remedy to employees against some or all of the employer unfair labor practices which Congress equally condemned. Where the Board declines for administrative reasons to assert jurisdiction over an industry, exclusion of state law maintains equality of treatment of all parties, for the Board declines to process unfair labor practice charges against any. Both sides are left to the free play "of economic forces." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480. But if the states were to step in with laws not patterned upon the federal, the balance of rights and equities which Congress sought to establish between the parties in such disputes would be upset.

Congress also sought to accomplish important national objectives by imposing limitations upon the Board's power to grant relief. To permit the states to accord relief without observing these limitations would thwart effectuation of the objectives Congress sought to achieve through the limitations.

The most important limitations are contained in Sections 9(f), (g) and (h) in which the Congress barred resort to the Act's remedies to labor organizations which refused

to rid themselves of Communist leadership or refused to file relevant financial information. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62. If the Board's refusal to act for budgetary reasons left the states free to accord remedies under their own laws, New York and Utah, for example, would be free to accord remedies against employer unfair labor practices to unions which refused to comply with the provisions of Sections 9(f), (g) and (h). Clearly, this would, *pro tanto*, nullify Congress' plan for ridding the labor movement of Communist leadership and for assuring that union members have information concerning the financial affairs of their union. *Kaiser-Frazer Parts Corp.*, 80 NLRB 1050, 1052; cf. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C. A. 4).

Many other Taft-Hartley objectives would be thwarted by permitting application of state laws, partially, but not wholly, consistent with the federal Act. For example, Congress determined that in this field an unusually short period of limitations, six months, was desirable. Section 10(b). States which accorded remedies against outlawed conduct on charges filed after a longer period sanctioned by the state would thereby frustrate the objectives which led Congress to fix the six month limit. In Section 10(c) Congress directed the Board to disregard affiliation or lack of affiliation with a national or international union in deciding cases alleging that a labor organization has been unlawfully assisted, supported or dominated by the employer. State laws outlawing company unions might, on the other hand, draw such a distinction and thereby reverse Congress' judgment. To the extent that Section 8(c) goes beyond the First Amendment, and the Fourteenth as it embodies the First, in according employers "freedom of speech" in labor matters, state laws might be more restric-

tive, and thereby trench on employer conduct which Congress determined to leave free. In Section 8(d), Congress provided that the duty to bargain collectively which it imposed on both employers and labor organizations shall not "compel either party to agree to a proposal or require the making of a concession." States enforcing their own comparable collective bargaining policies might require the parties to go further, thereby imposing a measure of obligation which Congress deliberately rejected.

We have shown above, pp. 42-55, *supra*, how a state thwarts the national Act's policies when it sanctions employer-induced repudiation of a union; when it permits employers, by coercion, to destroy the status of a union as exclusive bargaining agent, and when it enjoins peaceful picketing for purposes other than those which the national Act outlaws.

4. To avoid conflicts such as these, the proviso was deliberately phrased to assure that no state can acquire jurisdiction unless it undertakes to treat the dispute just as it would be treated if the Board exercised its jurisdiction. Congress understood that it would be impossible for any state to achieve consistency with national policy if it relied upon its courts to establish policy in the field of labor relations by common law methods. Consequently, in describing the standards which a state must meet to qualify for cession, the proviso uses the term "statute" rather than the terms "law" or "policy" which might be broad enough to encompass rules established by a state judiciary.

The language also shows that Congress understood that its policies could be substantially thwarted even in those instances where a state enacted a statute identical in terms with the national Act. It knew that national labor policy consists largely of interpretations of the Act through deci-

sions of the Board and the federal courts, p. 65, *supra*. To guard against conflicts which would result from different constructions of identical language,[33] Congress precluded cession even where the state statute is in terms consistent unless the state statute is also interpreted and applied consistently with the interpretation and application of the federal Act.

The language further demonstrates that Congress was concerned that there be not only complete consistency in substantive rules, but that there also be consistency in procedure and approach to the application of those rules. Having rejected the "court approach" for reasons of substance, pp. 55-59, *supra*, Congress precluded cession to any state which sought to regulate traditional weapons of economic conflict through its courts on "private initiative" (*Garner* v. *Teamsters Union*, 346 U. S. at 501), without the intervention of an administrative agency. Thus, Congress authorized the Board to cede its jurisdiction only to state and territorial "agencies," not to private parties or to state courts.

5. To undertake determination, in the absence of a cession agreement, whether state law meets the consistency requirement would transfer to the courts a responsibility which Congress in the proviso deliberately vested in the Board in the first instance. Congress entrusted the Board with the duty of effectuating the consistency limitation by withholding from the Board power to enter into cession agreements with any state agency unless the state statute was consistent with the federal. Before making a cession agreement, the Board is therefore required carefully to examine the state statute and its construction and appli-

[33] That form of conflict would be exemplified by a state which required employers to refrain from interference, restraint or coercion with employee self organizational rights, but which excluded employer circulation of union repudiation petitions from that category.

cation. Only after it is satisfied as to consistency with the federal Act may the Board properly make a cession agreement.

Determination, in advance of its application to a particular dispute, whether state law is consistent with federal, is a typically administrative, not judicial, function. That Congress deliberately, as the legislative history shows, pp. 62-63, *supra*, provided for such determinations by the Board, suggests that Congress was aware of the burden which would be cast upon the courts if it left questions of consistency between state and federal law entirely to adjudication on a case-by-case basis after state law had been applied to particular disputes. The cession agreement method eliminates much, if not all, of that burden. For if the Board finds inconsistency, it cannot and will not cede, and the state statute therefore cannot be given effect. If, on the other hand, state law is applied pursuant to a cession agreement with the Board, its application bears at least that *prima facie* validity which stems from an initial determination by the Board that the state statute is consistent, in terms and interpretation, with the federal Act.

To by-pass the absence of a cession agreement and inquire whether state law as applied to a particular dispute is consistent with the federal Act is thus to discard the method which Congress chose to effectuate its requirement that only consistent state laws be applied to labor disputes subject to federal power.

6. By selecting cession agreements, rather than mere declination of jurisdiction by the Board, as the method for transferring regulatory power to the states in borderline industries Congress avoided the uncertainty and conflicts which would have resulted if state jurisdiction were made to rest entirely on the Board's decision as to whether or not to assert jurisdiction at any given time. The con-

siderations which lead the Board to decline jurisdiction are themselves variables, and that alone assures that the area of industry over which the Board asserts jurisdiction will vary from time to time. See p. 26, *supra*. When the Board in July, 1954, raised its dollar value standards, it ceased suddenly to process many cases in industries which satisfied its earlier jurisdictional criteria. If state power were to flow from the Board's declination, state power would again terminate if and when the Board later lowered its sights.[34] Uncertainty as to whether and when the Board may alter its standards can be a fertile source of conflict. "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy." *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 26.

Prior to 1950, when the Board first attempted to codify its administrative policies, ascertainment whether the Board would or would not assert jurisdiction necessarily, in most cases, awaited decision by the Board on a case-by-case basis. Since, in these cases, the state could not act until the Board conducted its investigation, held a hearing, and issued its decision declining jurisdiction, state intervention would come too late to be effective in the dispute. Even after enunciation of the policy standards in 1950, and their later revision, the volume of Board decisions which deal with application of the standards, and the frequency of dissent among Board members in these cases, shows that ascertainment whether the Board will or will not assert its jurisdiction often is by no means easy.[35] To make state

[34] *Cf. Retail Clerks* v. *Your Food Stores of Santa Fe*, 124 F. Supp. 697, 703, rev'd, 225 F. 2d 659, 663 (C. A. 10).

[35] See, e. g., *Deskins Super Market*, 115 NLRB No. 252; *Gary Hobart Water Corp.*, 115 NLRB No. 253.

jurisdiction turn on the Board's policies in this area would leave the states largely uncertain as to the areas in which they are free to act. As the court said in *Universal Car Co.* v. *Association of Machinists,* Circuit Court, Kent County, Michigan, decided November 1, 1954, 35 LRRM 2087, 2098:

> If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision.
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> • • • • •
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> If it is necessary to choose between assuming that Congress did not intend a void in cases where the Federal Board refuses to exercise its jurisdiction and assuming that it did not intend to create chaos, I would have to conclude that the latter assumption was entitled to the greater weight.

The cession method Congress selected gave promise of assuring stability and certainty in the transfer of power to the states and vice versa. Cession agreements would undoubtedly fix the duration, as well as the scope, of state jurisdiction, and not leave state power dependent entirely on the national Board's whim. Moreover, federal and state agencies could provide for administrative machinery to resolve jurisdictional problems in cases which their agreement did not clearly cover, as the national Board and the New York Board did in the agreement between them referred to in the *Bethlehem* case.

These considerations, among others, led the Court of

Appeals for the Tenth Circuit in *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663, to hold:

> Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress.

7. To hold that the states may acquire jurisdiction otherwise than through a cession agreement would remove the incentive which Congress provided to induce the states to bring their laws into conformity with the national Act. Only if the states may not exercise jurisdiction over labor disputes in local industries unless they bring their statutes into conformity with the national Act can acquisition of jurisdiction under the proviso serve its function as a spur to the states.

8. Nullification of the proviso is the consequence of the argument that state courts acquire jurisdiction to regulate labor disputes by virtue of the Board's administrative declination. Moreover, the premise on which the argument for nullification rests—that Congress could not have intended to leave remedyless persons whose rights under federal law are invaded—does not support the conclusion. If Congress had intended to afford the parties an alternate remedy in cases where the administrative remedy was withheld presumably it would have vested jurisdiction in the federal courts. That is the normal presumption where Congress creates rights but provides no administrative enforcement method. *Texas & N. O. R. Co.* v. *Brotherhood, etc.*, 281 U. S. 548, 569, 570; *Steele* v. *Louisville & N. R. Co.*, 323 U S. 192, 207. But any presumption that Congress intended the federal courts to afford relief against

unfair labor practices at the suit of private parties where the Board declines to act is here refuted by Congress' unequivocal determination that federal courts are not to intervene except on application by the Board, pp. 55-59, *supra*. *Cf. Bakery Sales Drivers Local Union* v. *Wagshal*, 333 U. S. 437, 442. Congress rejected enforcement on private initiative through the federal courts not because it had less faith and confidence in the federal courts than in state courts, but because it considered the "court approach" an inadmissible method of enforcement. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." *Garner* v. *Teamsters Union*, 346 U. S. 485, 491.

That the proviso mentions only state and territorial "agencies", itself suggests, as we have shown, pp. 72-73, *supra*, that Congress considered state courts, like the federal courts, inappropriate instrumentalities for exercising the jurisdiction which Congress vested in the Board. In any event, to hold that in the absence of a cession agreement state administrative agencies are barred from asserting jurisdiction but that state courts are free to regulate the same conduct would mean that the more consistent with federal policy a state law is, the less free is the state to apply it. That would stand Congress' policy on its head. "* * * the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Teamsters Union*, 346 U. S. 485, 491; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 479. See also Brief for the National Board as *Amicus Curiae* in *Garner* v. *Teamsters Union, No. 56*, Oct. Term, 1956, pp. 33-41.

The question at issue here, and the basic question with which the proviso to Section 10(a) deals, is the existence of state power to regulate in the preempted field. To the extent that Congress permitted state power to survive, as it did in matters of violence, mass picketing and overt threats, it was unconcerned whether the states chose to exercise their powers through administrative agencies or through their courts. *United Automobile Workers* v. *Wisconsin Employment Relations Board & Kohler Co.*, 351 U. S. 266, 275. To the extent that Congress imposed limitations upon the character and means of state regulation in the preempted field, it did so on the premise that state power over the conduct involved was totally superseded and that it could revive only upon the state's undertaking to exercise such power in conformity with the conditions Congress deemed necessary to protect the public interest.

9. Whatever of substance may be thought to inhere in the argument for nullifying the proviso to Section 10(a) stems from the fact that the states did not, after its enactment, pass statutes consistent with the federal Act, p. 34, *supra*. For if they had, the Board would have been able to exercise the power which Congress gave it to vest jurisdiction in the states over the borderline industries in which the Board declined to assert its jurisdiction. Had the Board thus ceded its jurisdiction, there would have been no room for the argument that the Board's declination leaves parties remedyless.

For this reason, the Report of the Joint Committee on Labor Management Relations to the second session of the 80th Congress, as it relates to the present issue, carries unusual weight. The Committee had been established pursuant to the terms of the Act itself (Sections 401-403), to study and investigate the "administration and opera-

tion" of the new law and to make recommendations to the Congress of desirable amendments or changes.

The report was written a year after Taft-Hartley's passage, at a time when it was already clear that the states had not placed themselves in a position to acquire jurisdiction by cession from the Board, and that jurisdiction could not be transferred to the states pursuant to the proviso. The report reveals that Congress knew exactly what it was doing, and meant exactly what it said, in permitting the states to assert jurisdiction in the borderline industries only pursuant to cession agreements. The question with which the committee dealt was whether it was desirable in the light of experience to eliminate the limitations of the proviso and permit the states to assert jurisdiction under their own laws in those areas where the Board was unwilling or unable to assert its regulatory powers. The Committee said (S. Rep. No. 986, Part I, pp. 30-31):

> The proviso to section 10(a) of the act authorizes the National Labor Relations Board to cede to State agencies, jurisdiction over cases in any industry other than mining, manufacturing, communications, and transportation except where predominantly local in character. The right to cede such jurisdiction is limited, however by the requirement that the applicable provision of the State statute must not be inconsistent or have received a construction inconsistent with the corresponding provision of the act.
>
> The National Labor Relations Board has not reached agreement with any State agency since passage of the act. Extensive conferences have been held with officials of New York, Massachusetts, Pennsylvania, and Wisconsin looking toward the type of agreement permissible under section 10(a). Generally speaking, the statutes in these States were modeled after the Wagner Act. Corresponding sections of their statutes and the Labor-Management Relations Act of 1947 have

about the same degree of inconsistency as is found between the latter act and the Wagner Act. Some state statutes for example have not defined union unfair labor practices, nor have they limited the right to enter into compulsory union membership contracts. *It therefore appears that ceding of jurisdiction in unfair labor practice cases will not be possible unless and until a State enacts a statute modeled after the act.*

The Board's experience in attempting to work out agreements with the State agencies has demonstrated that it will only be possible with a State which enacts a statute following the Federal pattern. *The act requires a uniform national policy with respect to all industries whose operations substantially affect interstate commerce.*

The Board is now receiving a tremendous volume of cases. The desirability of permitting it to reduce this load of cases by ceding jurisdiction over *borderline industry, businesses primarily local in nature whose operations only indirectly affect interstate commerce,* appears obvious. However, if it can only be done by *an amendment to the act which would permit inconsistent regulations* and as many different policies as there are States having labor relations acts, *the desirability appears questionable.* (Italics added.)

Subsequently, bills were introduced to eliminate the proviso and substitute language permitting the states to exercise jurisdiction where the national Board declines to act.[36] The terms of the proposed amendments show that their sponsors recognize that, as the Act stands, state power, whether exercised by administrative agencies or

[36] S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953); S. 2218, 83rd Cong., 1st Sess., 99 Cong. Rec. 7283-7284 (1953); S. 2650, 83rd Cong., 2d Sess., 100 Cong. Rec. 91, 100 Cong. Rec. 5194, 5824, S. Rep. No. 1211, 83rd Cong. 2nd Sess. (1954). In 1949 Senator Taft offered an amendment which would have permitted the National Board to cede jurisdiction to state boards over cases in which the National Board declined to act "even though the State law is not entirely consistent with the Federal law." 95 Cong. Rec. 8506, 5590, 81st Cong., 1st Sess.

courts, is preempted and may revive only by cession from the Board.[37] Although the Act has been amended since 1947,[38] these proposals have not been adopted.

In sum, it cannot be said that by adopting a plan and pattern of regulation which is exclusive, Congress created a power "vacuum" in areas where the Board is unable or unwilling to assert its authority. Congress' plan permits, indeed encourages, the states to exercise regulatory power in a portion of the field preempted by the Act. But, on balance, Congress has thus far deemed it more important to exclude inconsistent state policies and enforcement mechanisms than to assure that a remedy of some kind is available to all parties at all times and under all circumstances. Judgments of this kind, of course, are for

[37] S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953) provided as follows:

> That section 6 of the Labor Management Relations Act, 1947, as amended, is amended by inserting '(a)' before the section number and by adding at the end thereof a new subsection as follows:
>
> "(b)(1) The Board, in its discretion, may decline to assert jurisdiction over any labor dispute where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.
>
> "(2) Nothing contained in this Act shall be deemed to prevent or bar any agency, or the courts, of any State or Territory, from assuming jurisdiction over labor disputes over which Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.
>
> "(3) The Board, in its discretion, may, by agreement with any agency of any State or Territory, cede to such agency jurisdiction over labor disputes involving (A) unfair labor practices or (B) controversies concerning representation, in any industry or portion thereof, even though such labor disputes may substantially affect commerce."
>
> Sec. 2. The proviso in section 10(a) of such Act is hereby repealed.

[38] Act of October 22, 1951, Public Law 189, 82nd Cong., 1st Sess., 65 Stat. 601.

Congress to make, and the wisdom of its decision is not an appropriate subject of judicial inquiry.

By resort to state courts in these cases, parties over whom the Board declines to assert jurisdiction for administrative reasons have mistaken their remedy. Under the Act as written, their appropriate recourse is to their respective state legislatures, which, by enacting laws consistent with the federal Act, may establish a foundation for acquisition of jurisdiction through cession from the Board. If such parties, or the states, regard Congress' requirement of consistency and cession as too restrictive or burdensome, they may ask Congress to change it. But they may not ask this Court to override Congress' judgment, for that is not within the scope of judicial power. As the Court said in *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 398:

> * * * This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation.

IV.

OHIO MAY NOT ENJOIN PEACEFUL PICKETING IN FRONT OF THE ENTRANCES TO FAIRLAWN'S STORES ON THE THEORY THAT THE PICKETS ARE TRESPASSERS.

The courts below found that the pickets, employees of Fairlawn and non-employees alike, were guilty of trespass by picketing on premises in which Fairlawn had a property interest at the West Richfield and Tallmadge stores (pp. 9-10, 12, 14, *supra*). At Market Street, although the pickets walked at the same place in relation to the store, there was no claim or finding of trespass because Fairlawn did not have a property interest in the area between the store

entrance and the highway (R. 159; 47, 58). Although the trespass ground cannot, therefore, sustain the injunction below as it applies to the Market Street store, the courts below may have regarded it as a ground independent of the object for enjoining picketing at the West Richfield and Tallmadge stores. Indeed, a separate provision of the decree enjoins defendants from "trespassing" on Fairlawn's property (R. 170).

To allow invocation of the "trespass" theory under the circumstances present here would make a drastic and widespread inroad upon the right peacefully to picket in labor disputes which Sections 7 and 13 of the Act, and the Fourteenth Amendment, guarantee against state impairment. Peacefully to picket is "traditional and permissible in a primary strike." *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 687. Where peaceful picketing occurs at a "geographically restricted area" near the entrance to the struck establishment it is protected by Sections 7 and 13 of the Act. *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665, 671, 672-673. "* * * preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" by such picketing is one of the objectives which Congress in the Act sought to promote. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. at 692. "* * * it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters Union,* 346 U. S. 485, 500.[39]

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[39] See also *Capital Service, Inc.* v. *National Labor Relations Board,* 347 U. S. 501, discussed in *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 475-476, 480. Cf. *Wisconsin Employment Relations Board* v. *Teamsters Union,* 267 Wisc. 356, 361, 66 N. W. 2d 318, 321.

The vicinity near the immediate entrance is the traditional and unquestionably the most appropriate place to picket a struck establishment. *Schneider* v. *State,* 308 U. S. 147, 162-165. It is there that the audience to whom the pickets appeal—customers, employees of the picketed employer, and employees of other employers who do business with the struck employer—all appear. It is there that the patronage of the primary employer which the pickets seek to disrupt takes place. See *Thornhill* v. *Alabama,* 310 U. S. 88, 100-101, 104; *Thomas* v. *Collins,* 323 U. S. 516, 533-534. Because peaceful picketing at the entrance to the struck establishment is virtually the only "practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute," the right to picket there is protected by the Fourteenth Amendment, as well as by the federal Act. *Schneider* and *Thornhill* cases, *supra;* Cf. Violations of Free Speech and Rights of Labor, S. Rep. No. 1150, 77th Cong., 2nd Sess., Pt. 1, pp. 4-5.

Normally, in the past, the entrance to a business establishment which served the consuming public was located off a sidewalk abutting a public street or roadway. In such cases, where a city owned the sidewalk, it was held that the city could not utilize its powers as property owner to forbid picketing on the sidewalk in front of the store entrance. *Schneider* v. *State, supra; Cf. Jamison* v. *Texas,* 318 U. S. 413, 415-416; *Hague* v. *C. I. O.,* 307 U. S. 496, 515. Indeed, community interests more substantial than the bare right to exercise absolute dominion over property were held insufficient to warrant prohibition of picketing at a store entrance. In the *Schneider* case, for example, the prohibition was designed to avoid littering. Yet that objective, even when coupled with the fact that the ordinance did not foreclose other avenues of communication,

did not save the prohibition. "* * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* case, *supra*, 308 U. S. at p. 163.

Where a private corporation, rather than a municipality, owns the sidewalk area adjacent to the entrance of a business establishment involved in a labor dispute it is equally clear that the state may not utilize its powers to support an exercise of property rights which infringes the constitutional and the statutory right peacefully to picket.[40] As this Court held in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506, where the state supported denial of the use of streets in a company town to distributors of religious literature, who were characterized as "trespassers":

> We do not agree that the corporation's property interests settle the question * * * Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. *Cf. Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793.

This Court and the courts of appeals have frequently recognized that action taken by an employer pursuant to his "property rights" may impair the exercise of rights guaranteed by Section 7 of the Act, and constitute an unfair labor practice. *National Labor Relations Board* v. *Le Tourneau Co. of Georgia*, 324 U. S. 793; *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 232; *National Labor Relations Board* v. *Lake Superior Lumber Co.*, 167 F. 2d 147 (C. A. 6). "Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."

[40] Cf. *Shelley* v. *Kraemer*, 334 U. S. 1; *AFL* v. *Swing*, 312 U. S. 321.

National Labor Relations Board v. *Stowe Spinning Co., supra; Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 802, note 8. Applying that principle, the Court of Appeals for the Seventh Circuit, in *Marshall Field & Co.* v. *National Labor Relations Board,* 200 F. 2d 374, 382, held that the employer violated the national Act by using its ownership of a street located between the two buildings of its store to bar access to non-employee union organizers. The court enforced the Board's order (98 N. L. R. B. 88), requiring that such access be permitted.

In recent years retail establishments particularly in suburban areas, have increasingly located their stores at some distance from the street or highway, for the purpose of providing parking facilities for customers and employees. This geographic pattern is particularly prevalent in suburban shopping centers, of which there are already thousands.[41] The stores in these centers, typically, are set back from the road or highway, are reached by driving over paved areas leading directly from the road to the stores, and rarely have public sidewalks parallel to the roadway. To picket a store so located in the course of a labor dispute, the pickets, like casual pedestrians (p. 10, *supra*), must therefore traverse the paved area, "private property", land often owned by or under lease to the employer involved in the dispute.

We do not believe that an employer can immunize himself against peaceful picketing in front of the entrance to

[41] *Allied Plans Biggest Network of Suburban Shopping Centers,* Business Week, January 15, 1955, p. 62; *Cutraters Move to Suburbs,* Business Week, January 22, 1955, p. 47; *Downtown Needs a Lesson From the Suburbs,* Business Week, October 22, 1955, pp. 64-65, 68; *Builder Owner of Largest Shopping Center,* Fortune, May, 1954, p. 44; *How to Expand Shopping Center Zones,* The American City, January, 1956, pp. 116-117.

his store merely by locating his store off a privately owned parking lot, rather than a publicly owned street. Such parking lots, like the sidewalks which parallel the street in urban shopping centers, are provided for the convenience of the shopping public generally. They are uniquely appropriate areas for dissemination to the interested public of information concerning the labor relations of the adjacent stores.

Even if there were a sidewalk parallel to the roadway at the West Richfield and Tallmadge stores there would be no assurance that if the "property rights" argument is sound employees or unions would be allowed by states such as Ohio to picket there. Such sidewalks would be located on "private property" and states might regard the store owner's refusal to permit picketing on the sidewalk as decisive. Aside from the fact that picketing on the highway would be unduly hazardous, in many instances even picketing on the highway would not overcome the "property rights" argument. See p. 10, *supra*.

Even if it were possible, as a practical matter, for a union to picket at a distance remote from the store entrance, in territory not privately owned, to compel the union to do so would impair both the effectiveness of the picketing and other interests which Congress desired to safeguard. Congress sought to preserve the right of unions to bring pressure to bear on the primary employer who is party to a labor dispute but to protect against involvement innocent employers who are strangers to the controversy. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 692. To effectuate these policies, the Board holds that a labor organization must picket as close as possible to the entrance of the primary employer's place of business, and not picket at a "remote approach * * * used by employees

of secondary employers in common with employees of" the primary employer. *Columbia-Southern Chemical Corp.*, 110 NLRB 206, 208. Since remote approaches, as distinguished from the customer parking lot or sidewalk areas adjacent to the store involved, are used by employees of other stores in the shopping center, and by employees of employers delivering merchandise to such other stores, as well as by employees of the struck employer, the union could picket at remote approaches only at the risk of being held to have engaged in an illegal secondary boycott under the federal Act. *Retail Clerks Union*, 116 NLRB No. 99, 38 LRRM 1323, 1324. In any event, picketing at a distance remote from the store entrance would certainly result in greater detriment to neutral employers than picketing at the very entrance to the store involved. To require picketing at a remote approach rather than at the entrance would upset the pattern of rights and immunities as between the various parties which Congress determined to be proper. For this reason the Board has recently specifically held that the legality of peaceful picketing under the national Act should not "depend on title to property." *Retail Clerks Union*, 116 NLRB No. 99, 38 LRRM 1323, 1324, decided August 24, 1956.

We do not contend, of course, that in determining whether the Act protects and permits union activities of various kinds to proceed on property which the employer owns, the employer's property rights are necessarily irrelevant. *Cf. National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105. We contend only that under circumstances such as are present here, when the employer freely permits the "property" which he owns to be used by employees, customers and casual pedestrians (R. 58), and where the area involved is appropriate and traditionally used for the particular union activity, the

employer cannot use the fact that he happens to own the property to justify foreclosing the activity. To deny permission in a labor dispute for peaceful picketing at a store entrance to employees and union representatives alike is to discriminate against activity which the National Act protects. *Cf. National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226.

We contend that the right peacefully to picket at a store entrance under these circumstances cannot turn on whether state courts would find that the employer has or has not technically "dedicated" such property to the public by inviting customers and pedestrians at large to use it so as to preclude him from distinguishing between them and others who seek to use it for the purpose of peacefully publicizing a labor dispute in which the store is involved. State rules concerning when private property has been dedicated to the public cannot control this issue for Congress did not make "the application of the federal act dependent on state law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 123. The "vagaries of state rules of law may not override provisions" of the national Act. *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 910 (C. A. 8). No matter what policy, public or private, state law may seek to promote, a "State may not prohibit the exercise of rights which the federal Act protects." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474.

It is on this ground that the Court of Appeals for the Tenth Circuit, properly, we believe, approved the holding of the District Court (per Bratton, C. J.) in *Retail Clerks Local 1564* v. *Your Food Stores*, 225 F. 2d 659, 662, and note 8, approving 121 F. Supp. 339 (D. N. M.), and reversing 124 F. 2d 697, 701-702 (D. N. M.), that a state may not, under circumstances comparable to those present

here enjoin peaceful picketing on the "trespass" theory. Accord: *Food Basket No. 2, Inc.* v. *Local 227, A. M. C.*, Civil No. 18,407, decided May 1, 1956, Court of Appeals of Kentucky, denying application to enjoin the defendants "from picketing upon the property of the Shelbyville Shopping Plaza or otherwise trespassing upon plaintiff's leasehold" (Not officially reported).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions to set aside the injunction and dismiss appellee's petition.

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APPENDIX.

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*, are as follows:

Sec. 1.

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Sec. 2. When used in this Act— • • •

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or

within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Ter-

ritory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer.

* * * * * *

Sec. 9. (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with

the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and by-laws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made

by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the

overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, under the rules of civil procedure for the district courts of the

United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who

has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

* * * * * *

Sec. 203.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon

its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

* * * * * *

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to

engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.